91-1735

Supreme Court, U.S.
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NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, !992

W. M. SCHEERER, PETITIONER

VS

ROSE STATE COLLEGE AND

EEOC, U,S.A., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

!. At the District Level, petitioner was under-represented by counsel who responded to every whim of the defend ants; he participated in their intimidation tactics contending,"you don't have anything to hide" or,"the case will be dismissed without your full cooperation". He failed to prosecute, failed to counsel, failed to respond to the flawed deposition Rose State presented as an exhibit for summary judgment. This exhibit and presentation to the court repre-represent fraud within the legal definition and victimized petitioner. Will the court address the misrepresentation, fraud upon the court, and consider the case in totality on the merits of the case?

2. When one merely states that a document was mailed without proof of mailing/receipt, is the alleged in-

tended recipient held accountable for a document which was never received?

3. Stonewalling complaints submitted to EEOC, 1982-89 was a common practice and thousands were denied due process. On the record, Congress intervened to allow workers to re-file. This complaint was submitted within this time-frame, will the petitioner be given consideration for benefits denied under this tactic?

4. The Appellate Court addressed the issue of sex discrimination although this was not a contention in complaints nor briefs. The complaints were of fraud, coercion, violation of Constitutional rights (racial discrimination), denial of due process, none of which were addressed by the defendants, the District Court, nor the Appellate. These complaints comprise the"heart"of this litigation. Will these complaints be addressed at some level?

5. Is there a criteria for equitable tolling?

6. Is the Equal Employment Opportunity Commission accountable for commitment failure in its legislated mission? Immunity?

7. Individuals work and represent the work place, is the individual or the agency he represents accountable for misdeeds in the line of duty or are they all immune?

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM 1992

W.M. SCHEERER, PETITIONER

VS

ROSE STATE COLLEGE, AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, W. M. Scheerer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit refusing to consider documents submitted by petitioner to substantiate request for equitable tolling. The District

Court in rendering its decision based its decision upon flawed evidence presented by defendants without consideration being given to the plaintiff's exhibits., also Appellate Court failed to respond to exhibits submitted although these exhibits supported all of the complaints of the petitioner, most of which had been obtained from the files of EEOC. Not only did the Courts fail to consider exhibits, it did not address the complaints. Also, there is a discrepancy in considerations/rulings in that EEOC failed to respond to Praecipe For Summons (never did), this was noted with Deputy Clerk (which made EEOC liable for damages sought) and it was not considered; the petitioner , the intended recipient of mailings not received, was held accountable for receipt, and EEOC was dismissed from suit by both courts based upon the statement of EEOC's assertion that it had mailed the documents to her address, disregarded counsel's address, Mailings wewe not proved, nor were they traced.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Scheerer v. Rose State College and the Equal Employment Opportunity Commission, 91-6180 (10th Cir. 1991), and appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Western District of Oklahoma appears in Appendix B, and the Order of the Court to Dismiss,Appendix C.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on December 4, 1991. This Court's jurisdiction is invoked under Title 28, U.S.C. 42(2000e et seq.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Vll, Rights in civil cases:

> In suits at common law, where the value in controversy shall exceed twenty dollsrs, the right of a trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV,

Civil Rights,

Section 1. :All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.S.: Rules of Civil Procedure

Rules: 52;56;60;65;71; and 74

CFR 29 FR1691: Administrative Rules, EEOC

The Civil Rights Act: 1964, and 1991 vers.4

STATEMENT OF THE CASE

The United States District Court for the Western District of Oklahoma had jurisd'lt

On December 4, 1991, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court for the Western District of Okla. in favor of the defendants, denying equitable tolling, ruling that Petitioner had been notified of procedure and failed to respond.

The defendant, Rose State College advertised a position as being available. The published qualifications for this position were a Master of Science in Nursing and two years teaching experience. Petitioner made application. She held the B.S.N., a Master of Science in Nursing Education with functional areas in teaching and supervision, clinical specialty, psychiatric nursing, and the doctorate in Administration in Higher Education, minor in Counseling and Guidance. Her experience included administration, Nursing Service (Ass. Dir.) Administration of Schools of Nursing, diploma, and baccalaureate (Director and full professor) which encompassed founding and implementing baccalaureate nursing program, teaching and supervision, on the diploma, baccalaureate and master's levels, and she had held all academic ranks in accredited colleges and universities. She had also participated in the accreditation process at respective schools of nursing. Additionally, she

had served in the capacity of "designated citizen ambassador on five continents upon' the invitation of patriots of the host countries. Her experience as a nurse educator was in excess of two decades. Her qualifications dwarfed the published requirement for the position which only required the MSN and two years experience.

Although the petitioner's qualifications exceeded the requirements and those of all other applicants, and the files of EEOC showed that References Rose State sought were excellent from her employers, petitioner/applicant was not considered for the position, not even an interview. Instead, a white applicant recruited at the last minute was employed, although she did not have the required qualifications; she held the B.S.N. and two years teaching experience, as documented from the files of EEOC. Rose State publicized that appointee held the MSN. and was well qualified.

EEOC's files showed that the personnel

officer noted that appointee was not one of the qualified applicants, was not even in the pool of applicants. Rose State's personnel officer also noted that the appointee was the only one administration had recommended and the employment of this individual was adverse to the employment policies of the college, adverse to EEOC's requirements as well as adverse to the Human Rights Commission's requirements, and yet she was appointed.

The petitioner, upon being notified by an employee who had been apprised of the hiring practices in filling this position, filed a complaint with EEOC within the designated timeframe. There the process was explained as to the role of EEOC, to investigate and take appropraite action which included filing a law suit.

EEOC failed to make any contact with the aggrieved,and the aggrieved efforts were met with stonewalling with explanations that the caseload was so heavy, case had not been

assigned. After years of waiting and being subjected to statewide networking, aggrieved proposed a settlement. However, with the urging of Rose State EEOC ruled that complaint was not timely filed; dated June 6, 1989.

Upon being notified that complaint was untimely filed, the aggrieved appealed to the Dallas office of EEOC, and to the D. C. office. The aggrieved requested the D. C. Office to review this finding. The request to this office was confirmed July 18, 1989, U.S.P.O. domestic mail receipt, article No. P048931366,certified.

Petitioner later rec'd letter from Burris dated Sept. 18, 1989 in which he pointed out reasons applicant had been rejected, lack of experience, whereas the appointee was well qualified and that she held the required degrees. This was inconsistent with what had been reported, and as the files of EEOC later showed. This means that the statements made by EEOC were fraudulent, represented conspiracy, the fraud being perpetrated and substantiated

In disgust, the aggrieved responded on the bottom of the fraudulent letter to the

D.C. Office upon receipt. It was only an oversight response was not dated,however, it was anticipated and expected that this letter/ response would be considered with the previously posted request for review, which had been made in July. There was no other letter from EEOC, nor contact, until January 12, 1990 wherein the Commission stated it had rejected request for review and that Jan. 12, 1990 was the last day to file suit. This was rec'd after 3PM on the 12th, with a holiday week-end. It was too late to file that day. On Tuesday, the day following the holiday, an attempt was made to file, however, the document was rejected by the clerk who stated that it had to be filed on specific forms and the required number The suit was filed the next day, the earliest day feasible. Adequate notice had not been given.

It is significant that EEOC abdicated its responsibilities to the aggrieved; it failed to follow-up on the information it had collected from the defendant, Rose State College;

when requested to review the findings of Oklahoma Office there was no response until January 12, the last day to file. Receipt of this notice was orchestrated for the 12th because it wasn't in the mailbox on the day before, the 11th.

Although EEOC had 60 days to respond to the PRAECIPE FOR SUMMONS filed on Jan. 17th, it never responded, a local Court Rule 7, a response is required, failure to respond makes respondant liable for damages sought. Upon surrendering proof of service/receipt to the deputy clerk, failure to respond by EEOC was noted to the clerk who said, "that's ok." To the aggrieved, this meant that record would show this since proof of receipt required a signature. This failure to respond was entered in the Appellate Court's Record in the Petitioner's Opening Brief.

An attorney was engaged upon the recommendation of two attorneys who recommended him. As the record shows, the attorney's conduct was a disaster for the petitioner, however, he could not have been more accomodating to the

defendant; he failed to prosecute; failed to counsel; became a participant in defendant's intimidation tactics; he failed to respond to flawed deposition defendant submitted in support of requet for summary judgment, he was present when deposition was taken and when petitioner objected to signing because of the placement on the page, he stated that corrections could not be made on the document, it would be brought out in court that placement was misleading, and that the signing only meant that it had been seen. He refuted all efforts by p titioner to read the record, contending that he was the attorney, he was.

The behavior of both, counsel for petitioner and counsel for defendant, Rose State College was of such an egègious nature that petitioner suffered irreparable damage. Petitioner sought representation in quest for justice, instead she was subjected to concerted intimidation, humiliation, exploitation, invasion of privacy, fraud, the demand for residental address/burglary and thief of personal

effects and documents, including creditors and deed to residence.

Refusal to correct the flawed deposition and to submit it as an exhibit to substantiate request for summary judgment constitutes fraud, an intentional perversion of truth, intended to deceive and take advantaage of another. This partial submission of a flawed deposition was part of a surreptitious stragety to obtain a summary judgment, deny trial in preventing exposure of fraud and how the position was filled. The District judge and the Appellate Court both based their decision upon this flawed document. Petitioner was unaware that this document had been submitted until she received the records and filed an appeal and there it was. Her attorney had been a party to this fraud otherwise he would not have allowed it to be entered.

In the Opening Brief to the Appellate Court, petitioner noted the flawed document and requested/demanded the complete document be submitted. This would have corrected the

misinformation. Instead of counsel responding as requested, she addressed the Court, requesting instructions and complained that petitioner was being unprofessional in submitting exhibits which substantiated her complaints. The behavior of defense counsel impaired the Court from rendering an impartial judgment based upon the truth, the whole truth; her behavior reflects an officer of the court committing fraud upon the court, intrinsic and extrinsic. Both Courts based their rulings on documents only, however, the Appellate Court failed to recognize petitioner's exhibits. Fraud is always intentional and is synonymous with dishonesty, betrayal of trust, perfidy. In instances such as this, relief from judgment may be rendered as was the case of Burton v G.A.C. Finance Co. (1976). The court ruled that plaintiff was entitled to relief under Rule 60(b) where trial court dismissed his actions without a hearing, on basis of particular document furnished by defendant to the court, but was not sent to plaintiff since

document was different from that exhibited with complaint, and plaintiff had not agreed to disposition of case on basis of pleadings and records. In employing this rule in the case of Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc., (1980,ED Va) 86 FRD 131,110BNA LRM 2052.29 FR Serv 2d 1181. Rule 60 (b) recognizes the court's inherent power to grant relief from judgment where court has been subjected to fraud and fraud upon the court is a matter so grave that relief is afforded without regard to any time limitation.

During the appeal process, Rose State's counsel violated the Rules of the Tenth Circuit and submitted two unauthorized briefs in addition to the authorized one, she pleaded for special consideration and attempted to debase the petitioner. Each time counsel addressed the court she noted that appellant was pro se, as if the court was unaware and she knew this.

All documents submitted by petitioner to Appellate with few exceptions, were photo-

copied by agency under the control of EEOC and paid for by petitioner through counsel. These document were compelling and should be regarded as credible and a preponderance of evidence in support of all complaints; the complaint of corruption is a matter of public record of the long term felony convictions.

Petitioner is pro se because of imposed deprivation of livelihood, reservation of counselors to enter discrimination suit, a flawed suit by colleagues, and exhaustion/depletion of resources. Pro se is the provision for the unrepresented in the absence of counsel and there should not be prejudice as implied in briefs submitted through innuendo.

Petitioner is without aspirations to represent self in a court of law. It was felt that in this instance, EEOC had a mandated commitment through legislation to perform its duties, one of which was litigation if necessary, however, EEOC abandoned its duties to the aggrieved, and the attorney the aggrieved obtained accepted her funds and failed to prosecute.

Petitioner is a health educator who has

been engaged in extensive philantropic services in the U.S.A.(where she rec'd the Citizens' Award at Arkansas, and abroad (where she rec'd the President's Recognition Service Award, Saudi Arabia) and other accolades. She is a member of Sigma Theta Tau, National Honor Society in Nursing, and the Delta Kappa Gamma, Honor Society of Women in Education. Being deprived of her livelihood has impaired ongoing national and international contacts, prevented fulfillment of commitments to work with the berbers et al; subsistence has been reduced to to dependency upon significant others' resources, and the subsequent loss of lingual skills needed for international travels from lack of usage. In addition to suffering these traumas, Rose State's counsel made demeaning inquiries as to her being a recipient of welfare a dehumanizing status.

It was expected that since there had not been a trial that the oral argument on appeal would be heard. A judge and friend had been requested to present the argument, this privi-

lege was denied, as was due process.

REASONS FOR GRANTING THE WRIT

The Civil Rights Act of 1964 was passed by the United States Congress after the African American citizenry had suffered grave indignities in attempting to exercise their rights; they had been subjected to bombs, death, even of children, physical and emotional scars (permanent), and exile, inflicted by law enforcement officers/recruits. These officers of the law maintained deprivation of rights with the use of electric cattle prods, killer dogs, whips made of water hoses, electric wire, and ax handles . These indignities in the oppression and deprivation were based upon skin color and African heritage. The African American's vested interest in this country was with his labor, blood, slavery, and death serving the military causes. They are the only people in this land with such a vested interest for such a long tenure (centuries) who have been subjected constantly to the lowest indignities contrived.

Those who opposed passage of the Act and were in position to cast a negative vote against it did so then as well as in 1991. Those who opposed the Act were white oppressors who held seats in the Senate, the Congress, and their constituents of all walks of life which included teachers, college professors, lawyers, judges, and state governors. The number of oppressors was expanded by "relocated exiles" seeking a better life, who were welcomed to our shores, who joined the privileged caste of oppressors who continue to oppose the African American's rights, only at present, the oppression is more covert.

The Civil Rights Act of 1991, Version 4 was finalized and enacted Nov. 13, 1991 in an effort by law makers, the Congress, and the Senate, to amend the Act of 1964 which had been been eroded by rulers who then, as now, opposed the Act. The synopsis to the Act:

"to strengthen and improve Federal Civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and other purposes".

Sect. 2 FINDINGS: The Congress finds that- (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the work place; (2) the decision of the Supreme Court in Wards Cove Packing Co., v. Atonio, 490 U.S. (1989) has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Sect. 3 PURPOSES: The purposes of this Act are-(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;(2) to codify the concepts of "business necessity" and "job related enunciation by the Supreme Court in Griggs v. Duke Power Co., 401 U. S. 424 (1971), and in the other Supreme Court decisions prior to Wards C Cove Packing Co. v. Atonio, 490 U.S.642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title V11 of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statues in order to provide adequate protection to victims of discrimination.

TITLE 1-FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN MAKING AND ENFORCEMENT OF CONTRACTS

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION. The Revised Statues are amended by inserting after section 1977(42 U.S.C. 1981) the following new section: SEC 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT "(a) RIGHT OF RECOVERY.-" (1)CIVIL RIGHTS.- In an action brought by a complaining

> party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C.2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statues (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Although it was only the African American who had been subjected to all of the indignities herein described because of his color and African heritage, with the passage of the Act, the handicapped, women, and minorities were included under the umbrella of protection. However, priority of these "additional protected" in many instances take priority over the African American so as to continue to deny him rights and employment, even when the African American's qualifications exceed the requirements and those those of the appointed (hired), as was demonstrated in this case. Also, the vehicle by which Congress passed to investigate complaints of

discrimination is governed by those who oppress and employ stonewall tactics to deny consideration, as this case also demonstrates. Through the court, substantiation of continued discrimination was shown in Wright v. Western Electric Co. (1981,CAT Tex), case when it found that:

> The District Court's finding that plaintiff failed to establish prima facie case of racial discrimination was clearly erroneous where plaintiff proved that he is a black male who had had two year course in electronics technology coupled with 11 years experience at the time he applied for the job as electric technician and was refused employment; plaintiff is not required to prove that he was the most qualified applicant for the position but only that his background was such that he was at least presumptively qualified.

In this case under consideration, the appointee was not qualified even to be considered for the position, administration had been advised against the appointment because of her lack of qualifications, and Rose State chose to appoint the unqualified, white female. Additionally, EEOC chose to support this miscarriage of the title "Equal Employment Opportunity Employer" banner, and even justified

the fraud through the mail and through the courts. Both defendants were equal participants in the fraud upon the people.

Fraud is a constant in Civil Rights Violations; it is a cognizant, calculated act. In the case, Citizens Standard Life Insurance Co., v. Gilley, Tex-Civ, it was found that:

> Elements of a cause for action for "fraud" include false representation of a present or past fact made by defendant, action in reliance thereupon by plaintiff, and damage resulting to plaintiff from such misrepresentation.

Fraud was identified in the employment practices of Rose State College, it published fraudulent advertisements for employment; fraud was identified in the findings of EEOC that complaint was untimely filed; joint fraud by Rose State and EEOC, conspiracy and perpetrated fraud. The D. C. Office of EEOC fraudulently failed to respond to the PRAECIPE for summons, and there were two other instances of fraudulent allegations that there had been posts of information to the petitioner which was never received and no efforts were made to

trace mailings; this was because there had not been the mailings claimed. Responses from EEOC were made to petitioner only on appeal. So the District Court was responsive in determining that petitioner had been notified of procedure, although there was no proof, nor efforts to prove. Petitioner showed proof that the D. C. Office of EEOC had received request to review the decision that complaint was untimely filed and instead, the D. C. Office of EEOC elected not to respond until January in its denial of requested review as being untimely received in October, when it had received the request in July as documented.

The rulings of the Courts were based upon fraudulent claims by EEOC that petitioner had been notified of specific dates, petitioner had not been notified. (See Appx. A and B)

As to the initial complaint of petitioner to EEOC, the District Court ruled in its findings that "plaintiff's charge was indeed filed within the statutory period". (See Appendix B, page 13). Ruling shows that

Burris, EEOC administrator abdicated his responsibilities and committed fraud in his ruling that complaint was untimely filed, and this was after years of stonewalling. Timeliness was addressed in the case of Robinson v. Fairfield (1985, CA 11 Ala):

> Finding of trial judge in racial discrimination in employment action under Title VII (42 USCS § 2000e et seq.) that action filed on June 3, 1983, was commenced within 90 days after receipt of right to sue letter was not clearly erroneous when based on reasoning that letter dated March 4, 1983, even if mailed on that date, would not have been received by plaintiff before the following day.

As far as timeliness is concerned in this case under consideration, the fraudulent allegations as to untimely filings by petitioner is without credibility, as is the case with fraud. The claim of petitioner that she had requested a review in July is documented and cannot be refuted. The letter denying the requested review was canc with the postal stamp and returned and this was documented. In the case of United States v. Kaplan (1960, CA 5 Fla.) under Rule 52 N.106, it was posited that:

Appellate Court may reverse where, if there

> is evidence which is credible would be substantial force, and effect of testimony considered as a whole convinces that the finding is so great preponderance of credible testimony that it does not reflect or represent truth and rights of case.

It would seem that exhibits submitted to Tenth Circuit support the concept of a preponderance of evidence on behalf of petitioner, and that Rule 52 is applicable. None of the exhibits which were submitted by the petitioner are refutable, they are all credible, most of which were obtained directly from the files of EEOC. (See Rule 52:N.122;123;216;223; Appx.D)

After the aggrieved contacted EEOC and filed her complaint, EEOC never gave any "feed-back" and her efforts to ascertain status of compla_.. was always met with stonewalling by EEOC. Under the investigative authority, EEOC was negligent in following-up its findings as provided in 29 CFR Sect. 1601.15, states in part:

> As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which person claiming to be aggrieved, the person making the charge on behalf of such a person, if any, or respondent wishes to submit, The Commission may require a fact-finding con-

> ference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative foru intended to define issues, to determine which elements are undisputed, to resolve i issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge.

The individual who notified the aggrieved of the practices employed in the filling of the position was prepared to come forth as a witness, bu due to the stonewalling by EEOC, the employee relocated; never given the chance to support claim. The lack of action by EEOC reflects indifference to claim even though it had on record, the discre pancies which were later revealed in the files.

It has been posited by the Courts that a Summary Judgment is the extreme remedy which deprives one of the contenders of a trial. In the case, Massaro V. Venitron Corp.(1983, D.C. Ma,

> Rule 56 N. 140 showed that: Defendant, seeking order of summary judgment in his favor, has the burden of affirmatively demonstrating that, with respect to every essential issue of each complaint, there is no genuine issue of fact, even though issues are those on which plaintiff would have burden of proof should case go to trial.

In the instance of this case, the court was assured by counsel for Rose State that there were no issues, although none of the issues had

been addressed. It is apparent that counsel for Rose State was confident that the Court would accept the flawed document and also there might have been reliance on cultural / collegial affiliations. Perhaps based upon these prospects, counsel assured the court that there were no issues, requested a summary judgment so as to deny a trial wherein the truth would have surfaced and the plot exposed. Also, this is a factor in denial of due process. The Court was convinced there were no issues.(Appx.D:R56 N 135;139-40;R55N108;603-08)

In the interpretive notes and decisions, the summary judgment procedure of the predecessor to Rule 56, U.S.C.S., 1983, p.421,states

> It is inappropriate to grant summary judgment against plaintiff, if it is at all possible that plaintiff may be able to meet the burden of proof, and test is whether viewing pleaded facts in light most favorable to plaintiff, there is any basis upon which plaintiff might recover; opposing party must be given benefit of all reasonable inferences favorable to which might be drawn from pleadings, and defendant's motion will be denied where it can not be said with any degree of certainty that plaintiff would be unable to offer proofs tending to establish ultimate facts necessary to support its claim, even though

plaintiff proceeded on the wrong legal theory.

In the instance of this case, counsel for petitioner did not submit any exhibits contending that they would be submitted to the court during court; counsel had in his possession,' all the exhibits which were presented to the Appellate Court. Since this was the case, it would seem that the above interpretation would be appropriate and applicable. As noted above, none of the issues raised by petitioner were addressed. Exhibits which verified all allegations of the petitioner (documents obtained from the controlled files of EEOC and retained documents) were submitted to the Appellate Court because they had not been made available at the District Level in anticipation of trial.

Petitioner at no time received assistance from any of the social services; her subsistance has been upon her own resources and those of significant others. At no time did petitioner request special consideration from the courts, potential employers, nor was there ever any attempt to receive special consider-

ationthrough the avenue of affirmative action. At all times, petitioner strove to meet the requirements prior to applications/engagements. Expectations were always based upon the premise "You have to be qualified." The expectation of potential employers was that consideration would be given to credentials, academic and experiential. However, racists have special qualifications, exclusion based upon race and heritage; the practice of Rose State College, as shown by its practices.

Racial discrimination in employment:intentional, as was in this case. There was beligerance and economic terrorism as "statewide networking" was employed. Petitioner's qualifications far exceeded most if not all nurse educators' qualifications in the state of Oklahoma, considering that the two previous deans of the College of Nursing at the Univ. of Oklahoma held only the BSN and the MSPH, the implementors of the Masters' Nursing Program. (G. Smith and L. Singer) Racial discrimination is dehumanizing, as is intended; it is illegal, but prevalent and those who practice it should be accountable.

In Appendix A., the Appellate Court addresses the dismissal of charges against EEOC and the named individuals employed in administrative positions. The court acknowleged that several recent opinions of "this circuit reversing similar rulings in roughly comparable settings", and decided that "we need not resolve the matter, and that "the court of appeals is free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." This raises the question, why were the rules established to guide decisions?

The Appellate Court in responding to the Summary Judgment for RSC was based upon Rose State contending that complaint was based upon prohibition of discrimination on account of blindness or sexual discrimination. Specifically the complaints were of Violation of Constitutional Rights, Discrimination based upon race, fraudulent conspiracy, denial of due process, coercion and corruption.

The comments (findings) of the Appellate

Court bear little resemblence to the complaints Petitioner charged to the Defendants because sexual and impaired sight were never entered by Petitioner and she was unaware such complaint had been tended.

Copies of the Praecipe For Summons were served upon the President of Rose State; Donald Burris, and the Attorney General because of the inclusion of EEOC.

There were no responses from EEOC/Att. General nor Burris. The first response received from EEOC after the Summons was the ruling from the Court dismissing EEOC from the suit.EEOC had not served the Petitioner, she was in North Africa at the alleged time the document was mailed to the mailbox, and it wasn't there upon return, and her counsel had not been served.

As to the Determination Letter, it was never received, only the form from Burris stating that complaint was untimely filed, and EEOC did not have jurisdiction. The January 12th letter was inadequate notice.

It is "odd" that EEOC stated that it sent the document to the postal address instead of to her counsel. On the dates referred to, Petitioner was out of state and then out of the country in North Africa on a mission. Had the document been mailed as alleged, a tracer could have been made.

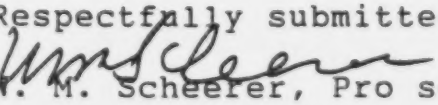
To challenge the practice of racial discrimination, even with qualifications is to be subjected to a maze of legal maneuvers, intimidation and harassment, and financial drain.

To grant the writ is in the interest of justice, and because it is right.

CONCLUSION

For reasons set forth above, petitioner, W. M. Scheerer respectfully requests that a writ of certiori issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,



W. M. Scheerer, Pro se

Dated: March 2, 1992
Revised: April 21, 1992

APPENDIX A

PUBLISH

United States Court OF APPEALS

~~TENTH~~ CIRCUIT FILED Dec.04 1991

W. M. SCHEERER
Plaintiff-Appellant ,

v.

ROSE STATE COLLEGE:EQU_
AL EMPLOYMENT OPPORTUN_
ITY COMMISSION:DONALD
BURRIS: AND EVAN KEMP,

Defendants-Appellees

ROBERT L. HOCKER
Clerk

No. 91-6180

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C.NO.90-CV-101-B)

Submitted on the briefs:

W. M. Scheerer,pro se.

Sherry Blakenship and Ted Pool for Defendant-Appellee Rose State

Donald R. Livingston, Acting Gen. Counsel, Gwendolyn Young Reams, Assoc.gen. Counsel, and Lamont White, Attorney,Equal Employment Opportunity Commission, Washington,D.C., for Defendants-Appellees Equal Employment Opportunity Commission, and Evan.J. Kemp

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Before ANDERSON,BARRETT,and BRORBY, Circuit Judges.

BARRETT, Senior Circuit Judge.

Plaintiff appeals[1] from an adverse judgment of the district court, which in three separate orders granted a Motion to Dismiss filed by Defendant Equal Employment Opportunity Comm. (EEOC) another such motion filed by Defend'ts Donald Burri and Evan Kemp (individual EEOC Defendants), and a Motion for Summary Judgment filed by Defendt Rose State College (RSC). Plaintiff broughtthis action under various civil rights statues to redress an alleged discriminary hiring practice by RSC and alleged discriminary failure by EEOC properly to investigate and pursue her claim against RSC.

Dismissal of EEOC

In its Motion to Dismiss, EEOC argued that Congress has not authorized, either expressly or impliedly, a cause of action directly against the EEOC for misprocessing of claims asserted against third party employers. R.Vol.1,docs.4 &5. This motion was renewed when Plaintiff, then represented by counsel, amended her complaint. R. Vol. 1, doc. 13. Plaintiff never responded to the motion. Consequently, the district court did not reach the merits of the motion, (ok.R.14

[1] After examining the briefs and appellate record

R. 14(A), pursuant to which an unanswered motion may be deemed confessed. R. Vol. 1,doc.14 (Order granting EEOC's Motion to Dismiss);see also R.Vol.1,doc.19(Order denying Plaintiff's Motion to reconsider Dismissal of EEOC)

In light of the circumstances surrounding the timing, service, and reassertion of EEOC's motion,[2] see R.Vol.1,doc.16 (Plaintiff's Memorandum Brief in Support of Motion to Reconsider Dismissal of EEOC), there is a serious question whether the district court's purely procedural disposition could be upheld in view of several recent opinions of this circuit reversing similar rulings in roughly comparable settings as duly drastic. See, .e.g.,Miller v.Department Treasury, 934F.2d 1161,1162 (10th Cir. 1991); Han-

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this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App.P. 34(a);10th Cir.R.34.1.9. The case is therefore ordered submitted without oral argum't.

[2] EEOC had been neither named as a party in Plaintiff's initial, pro se pleading nor served with process when it filed its Motion to Dismiss and accompanying brief, which Plaintiff averred she never received. After Plaintiff retained counsel and filed her amended Complaint adding EEOC as a named defendant, EEOC "reasserted" its Motion to Dismiss but never served the underlying materials on counsel or plaintiff.

cock v. City of Okla. City, 857 F2d 1394, 1396 (10th Cir. 1988); Meade v. Grubbs, 841 F2d 1512, 1519-22 (10thCir. 1988. We need not resolve the matter, however, as we conclude that dismissal of Plaintiff's claim is appropriate on the substantive legal basis asserted in EEOC's motion. See generally Griess v. Colorado, 841 F2d 1047 (10th Cir. 1988)(court of appeals is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court")(quoting Alfaro Motors, Inc. v. Ward, 814 F2d 883,887 (2d Cir. 1987).

The circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim". Peavy v. Polytechnic Inst., 749F. Supp. 58,58(E.D.N.Y.1990),aff'd,940F.2d 648(2 Cir. 1991);see,e.g., McCottrell v. EEOC,726F2d 350, 351 (7th Cir.1984);Ward v. EEOC 719F2d 311,313 (9th Cir.1983),cert. denied, 466 U.S.953(1984);Francis Sobel v. Univ. of Me., 597F2d 15,17-18(1st Cir)cert. denied,444 U.S. 949(1979) Georator Corp. v. EEOC, 592 F2d 765, 767-69 4th Cir. 1979. Following this

established line of authority, we hold that plaintiff's claim for compensatory punitive damages against EEOC under cited statutory authority should have been dismissed pursuant to Fed.R.Civ. P.12(b)(6), as originally argued by EEOC below.

Dismissal of Individual EEOC Defendants

We need not decide here whether and what circumstances EEOC employees, as opposed to the agency itself, may be subject to suit for improper conduct in connection with the processing of discrimination charge. The district court noted Plaintiff's claim in this regard could be dism'd because"Plaintiff has failed to allege direct personal involvement on the part of defend's Kemp and Burris". R. Vol. 1,doc.31 at3(Order granting individual EEOC defendants' motion to dismiss).Indeed, although these defendants are named parties not one factual allegation in Plaintiff's Amended Complaint so much as mentions them. See R. Vol. 1, doc. 11. All of the allegations regarding misprocessing of Plaintiff's discrimination charge attribute such conduct to the agency itself, without elaboration. Id at 6-8. It was proper for the district court to dismiss the indiv. EEOC

Defendants, as no claim was even facially stated against them.[3]

Summary Judgment for RSC

Plaintiff relied on several legal bases for her action against RSC, all of which were rejected, for various reasons, by the district court. Plaintiff invoked 20 U.S.C.§1681 (prohibiting sex discrimination in federally funded programs) and §1684 (prohibiting discrimination on account of blindness or visual impairement in in federally funded programs) without any further elaboration in her Amended Complaint. In its Motion for Summary Judgment, RSC argued that plaintiff could not establish a prima facie case case of sex discrimination under §1681, which incorporates the same elements of proof required in in Title V11 cases, seeMabry v. State Bd. of Community Colleges and Occupational Educ.,813 F2d 311,316-18 (10th Cir.), cert.denied, 484 U.S. 849 (1987), because the position denied plaintiff was filled by another woman.[4] See Risher v. Aldridge, 889 F2d 592, 596 n.11(5th Cir.1989) (prima facie case for sex discrimination in hire.

799 F2d 470, 474(9th Cir. 1986)(discriminatory discharge); Namenwirth v. Board of Regents,769 F2d 1235, 1240 (7th Cir. 1985)(discriminatory denial of tenure), cert.denied, 474 U.S. 1061 (1986). RSC contended that §1684 "is not applicable to this case since the plaintiff is neither blind nor suffering from severely impaired vision and makes no allegations of such". R.Vol 11 at 13. The district court granted RSC's motion as to these sections because Plaintiff wholly failed to substantiate her position in response to the argument above. Plaintiff has likewise, on appeal, neglected to address directly either the district court's ruling or the merits of RSC's arguments. We affirm the district court on these matters.

The district court concluded that Plaintiff's reliance on 42 U.S.C§1981 and §1982 to redress conduct that occurred some four and a half years prior to suit was precluded bu the two year statue of limitations applicable to personal injury suits in Oklahoma. See Okla. Stat. tit 12,§95(Third). See generally Meade

v. Grubbs, 841 F2d at 1524. The Supreme Court has held that the forum state's statue of limitations for personal injury actions provides the appropriate limitations period for civil rights claims under §1981, Goodman v. Lukens Steel Co., 482 U.S.656, 660-62 (1987), as well as 42 U.S.C.§1983, Wilson v. Garcia,471 U.S. 261,' 276-80 (1985), but the court has not yet addressed the issue in connection with §1982. However, we agree with the district court that the same basic considerations underlying the holdings in Goodman and Wilson apply with respect to Plaintiff's§1982 claim and, therefore, that section 95 (Third) barred its assertion as well.[5] See Village of Bellwood v. Dwivedi,895 F2d 1521, 1528 (7th Cir. 1990)(authority for application of state personal injury statue of limitations to §1982 suit (a point parties stipulated to) could be derived by combining Wilson hold-

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to amend her pleadings to supply the particularized factual allegations the district court found lacking in its order dissmissing these defendants.

[4] We also note that Plaintiff's Amended Complaint is deviod of any factual allegation of sex discrimination.

[5] Although Plaintiff's cause of action accrued prior

regarding §1983 with prior circuit precident that §1982 & 83 should be treated the same for limitation purposes); Rodriquez v. Village of Island Park, Inc., No CV 89-2676, 1991U.S.Dist. LEXIS 9469, at *13-14 (E.D.N.Y. July 2, 1991)(post Wilson and Goodman decision holding that §1982 is sufficiently analogous to §1981 and §1983 warrent use of the same limitation period); see also Allen v. Gilford,462 F2d 615,4th Cir. (pre-Wilson decision
(pre-Wilson decision holding that §1982 should be governed by same statue of limitations applicable to §1983, cert denied, 409 U.S.876(1972) Waters v Wisconsin Steel Works of Int'l Harvester Co., 427 F2d 476,488 7th Circ pre-Goodman decision holding that §1982 should be gov. by same statue applicable to §1981, cert den.

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to Goodman, we see no retroactivity peoblem in applying section 95 (Third) to plaintiff's claims under §1982. A year before the events involved here, this court presaged Goodman by applying section 95 (Third) to a §1981 claim in an action arising out of Okla. See EEOC v.GAddis, 733 F2d 1373, 1377 (10th Cir. 1984) While we have no comparable §1982 decision, given our holding Gaddis and Abbitt v. Franklin 731F2d 661 662-63(10th Cir. 1984 applying sect. 95 (Third)to §1982 claim is simply an extension of action asserted here. Under the circumstances, reliance on statue of limitations other than Sect. 95 would have been unfounded.

cf Callwood v. Ouestel,883F2d 272,274(3d Cir. 1989)(personal injury statue of limitations to §1985 claim in light of Wilson and Goodman.

Finally, the district court dismissed Plaintiff's Title V11 claim of race discrimination as untimely filed under 42U.S.C.§2000e-5(f)(1). The district court recognized that this non-jurisdictional limitations period is subject to equitable tolling, see Gonzallez-Aller Balsevro v. GTE Lenkurt, Inc., 702 F2d 857,859 (10th Cir. i983) Supreme Court's holding regarding nonjursidictional status of requirement that charge be timely filed with EEOC, see Zipes v. TransWorld Airlines, Inc., 455 U.S.385, 393 (1982), is equally applicable to §2000e-5(f)(1) requirement that suit be timely filed infederal court), but concluded that the circumstances did not warrent such relief. SeeR.Vol. 1,doc. 50 at 5-8, 1012. We agree. (I)n this circuit, a Title V11 time limit would be tolled only if there had been "active deception" of the claimant regarding procedural prerequisites.. John-

son v. United States Postal Serv., 861 F2d 1475, 1481 (10th Cir. 1988) cert. denied, 110 S. Ct. 54 (1989).The EEOC's September 29, 1989, Determination unequivocally advised plaintiff that, absent a request for review made by Oct. 13, 1989, the existing determination would be come final and her right to sue would expire on January 12, 1990. See R. Vol.11, Exhibit 9. The EEOC repeated the same admonition in its January 5, 1990, rejection of Plaintiff's untimely request for review. See R. Vol.11, Exhibit 10. While Plaintiff evidently relied to her detriment upon her belated, and therefore ineffective request for review, this was not due to a false representation by any court, agency, or putative defendant. Johnson, 861 F2d at 1481. Moreover, the EEOC documents involved here exhibit none of the misleading ambiguity we deemed sufficientto warrant equitable tolling in Martinez v. Orr, 738 F2d 107,1111-12 (10th Cir. 1984). On the contrary, the mandatory nature of both the January 12, 1990, deadline and the time limitation on the only exception thereto was made ab-

undantly clear by EEOC.

For the reasons discussed above, we AFFIRM the judgment of the United States District Court for the Western District of Oklahoma in favor of all defendants.

UNSIGNED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF OKLAHOMA

W. M. SCHEERER,

Plaintiff

VS

ROSE STATE COLLEGE

Defendant

No. Civ90-101B

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the court is the motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure filed by the Defendant, Rose State College on March 8, 1991. Plaintiff's response was filed on March 25, 1991. The issues have been fully briefed and are ripe for determination. After careful review of the motion, supporting brief and attached exhibits as

the court finds that Defendant's motion for summary judgment should be granted as to each of Plaintiff's claim.

Plaintiff, Wynelle Scheerer's, complaint results from Defendant's failure to hire Plaintiff as Director of Nursing, a decision which plaintiff claims was based on discriminatory hiring practices. This court's jurisdiction is invoked under 28 U.S.C.§ 1331, 28 U.S.C§ 1343(3) and (4) and 28 U.S.C.§§ 2201 and 2202. Plaintiff brings her action under Title V11, 42 U.S.C.§2000e, as amended as well as 42 U.S.C.§§ 1981 and 1982, and 20 U.S.C.§§1681 and 1684. Defendant's motion for summary judgment addresses each of these claims.

Standard of Review

The standard for granting summary judgment is expressed in Rule 56 of the Federal Rules of Civil Procedure. This rule provides that judgment is proper "if the pleadings, depositions, answers to interrogaties, and admissions on file, together with the affi-

if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed R.Civ.P.56 (c). When a motion for summary judgment is made, the opposing party of the motion may not rest on the peadings or mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. Id. at 56 (e). The adverse party must present sufficient evidence that his claim has merit. Mitchell v. Forsyth, 474 U. S. 511, 526 (1985). On a summary judgment motion, the court is required to pierce the pleadings and evaluate the actual prood to determine whether summary judgment is appropriate. Fed.R.Civ.P.56 (Advisory Committee Notes).

I. 20 U.S.C. §§ 1618 and 1684 Claims

As a preliminary matter, Plaintiff has wholly failed to address Defendant's argument with respect to her claims brought pursuant to 20 U.S.C. §§1681 and 1684. Therefore, the court deems Plaintiff to have waived or abanded those claims. Defend-

ant's motion for summary judgment is granted ted as to those claims arising under 20 U.S.C. §§1681 and 1684.

II, 42 U.S.C. §§ 1981 and 1982 Claims

Second, a review of the record in this case reveals that Plaintiff's claims under 42 U.S.C. §§ 1981 and 1982 are clearly brought outside the applicable statue of limitations with respect to these particular civil rights statues. Federal civil rights statues do not specify a statue of limitations for section 1981 and section 1982 actions. Therefore, courts have uniformly clear in stating that a federal court should adopt the most analogous statue of limitations. Wilson v. Garcia, 471 U.S.261 (1985) The characterization of an action for purposes of selecting tha appropriate state statue is ultimately a question of federal law. International Union, United Auto, Aerospace & Agr. Impl. Worker v. Hoosier Cardinal Corp383 U.S. 696 (1966). In the Garcia case, the Supreme Court ruled that section 1983 claims are best characterized as personal injury actions for purposes of selecting the most appropriate

statue of limitations. The Supreme Court has further found that the Garcia rationale is equally applicable to claims brought under 1981 since all section 1981 claims are in essence actions for injury to personal rights. Goodman v. Lukens Steel Co., 482 U.S. 656 1987). See also EEOC v. Gaddis, 733 F2d 1373 (10th Cir. 1984). Likewise, actions brought pursuant to section 1982 are best characterized as personal injury actions. See Goodman 482 U.S. at 660-61(sections 1981, 1982 and 1983 are all "part of a federal law barring racial discrimination, which ..is fundamental injury to the individual rights of a person"). Under these holdings, the most analogous Oklahoma statue is the two year limitations period for injury to the rights of another. SeeOkla Stat. tit. 12 §95.

Further, Oklahoma law is clear with respect to the accrual of causes of action for claims for injury to the rights of another. Generally, the statue of limitations begins to run when the cause of action accrues

is to ascertain the time when the plaintiff could first maintain her action. Knudson v. Weeks, 394 F. Supp 963(W.D. Okla. 1975). In the present case, the court finds that Plaintiff's claim accrued when she was informed that the employment decision had been made and she was not hired. As will be discussed in greater detail infra, Plaintiff had acknowledge that she was not hired for the position in May or June, 1985[1]. The record reflects that Plaintiff's complaint was filed on January 17, 1990, well outside the two-year limitation period.

Moreover, the law is equally clear that filing an administrative claim under Title V11 does not toll the statue of limitations on an action brought pursuant to sections 1981 and 1982 concerning equal rights under the law. Page v. U.S.Indus. 556 F2d 346 (5th Cir. 1977). The court concludes, therefore, that Plaintiff's

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[1] The precise date is not particularly relevant to the present discussion as it will be when the court addresses the limitations under Title V11.

claims brought under 42 U.S.C.§§ 1981 and1982 are time barred. Consequently, those claims should be dismissed.

III. Title Vll

Next, the court addresses Plaintiff's Title Vii claim for race discrimination and the effect of the statutory limitations period on her claim. For purposes of analyzing these issues, the court finds the following facts are uncontroverted by evidence.

On January 5, 1985, Plaintiff responded to an advertisement soliciting resumes for the position of Director of Nursing at Rose State College. She reapplied for the position on May 2, 1985, Plaintiff was notified by letter dated June 24, 1985, and mailed to Plaintiff's address that she was not hired for the position.[2]

Plaintiff filed a charge of discrimination with Equal Employment Opportunity Comm. ("EEOC") on March 26, 1986. The EEOC referred Plaintiff's charge to the Oklahoma Human Rights Commission on April 11, 1986. The state agency indicated that it did not

initially intend to process the charge and deferred to the EEOC on April 23, 1986.

EEOC issued a dismissal and notice of right to sue on June 6, 1989. The EEOC determined that Plaintiff's claim was untimely filed, and therefore, the Commission had no authority to investigate her claim. By letter dated June 9, 1989, Plaintiff informed Donald Burris, Oklahoma City Area Dir. of EEOC, that she "rejected" the dismissal of her charge. On August 24, 1989, the District Director of EEOC notified the plaintiff that her charge was to be reopened for the limited purpose of acquiring more information on the timeliness of the charge. Defendant's Ex. 7 attached to its brief in support of its motion for summary judgment. However, by letter dated Sept. 18, 1989 Donald Burris addressed the merits of Plaintiff's charge rather than the timeliness issue for which the charge had been reopened. His determination was that there had been no racially discriminatory motive in rejecting Plaintiff for the Director's posit-

ition. On Sept. 24, 1989 Mr. Burris sent a letter entitled "DETERMINATION" to plaintiff informing her that her charge had no merit. It further informed her that she could request a review of his determination if she did so before October 13, 1989. The significant language provides:

> This determination does not conclude the processing of this charge. If the Charging party wishes to have this determination reviewed, she must submit a signed letter to the Determination Review Program which clearly sets forth the reasons for requesting the review and which lists the Charge Number and Respondant's name. Charging Party must also attach a copy of this Determination to her letter.
>
> These documents must be PERSONALLY DELIVERED OR MAILED (POSTMARKED) ON OR BEFORE OCTOBER 13, 1989 to the Determinations Review Program. IT IS RECOMMENDED THAT SOME PROOF OF MAILING, SUCH AS A CERTIFIED MAIL RECEIPT, BE SECURED.
>
> If the charging party submits a request by the date shown above, the Commission will review the determination. Upon completion of the review the charging party and respondant will be issued a final determination which will contain the results of the review and what further action, if any, the Commission will take. The final determination will also give notice of appropriate, to Charging Party's right to sue.
>
> If the charging party does not request a determination by October 13, 1989, this determination will become final the following day, the processing of this charge will becomplete and the charge dismissed. (This letter will be

> the only notice of dismissal and the only notice of the charging party's right to sue sent by the Commission. FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by January 12, 1990, the Charging Party's right to sue will be lost.

Defendant's Ex. 9 attached to its brief in support of its motion for summary judgment(emphasis in second paragraph added).

Plaintiff typed a response to Mr. Burris' letter on the bottom of the Sept. 18,1989, letter and sent it to theDeterminations Review Program in Washington, D. C. where it was received on October 27, 1990.[3] Defendant's Ex.8 attached to its brief in support of its motion for summary judgment. On

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[3] Plaintiff's counsel argues that plaintiff contends that she filed her request for review of determination on or before the 1st day of October, 1989. Plaintiff's brief in support of the objection to motion for summary judgment at 4. However, the record is devoid of any evidence relative to this contention.

January 5, 1990, the Acting Director of the Determinations Review Program notified Plaintiff that her request for review was untimely. It further stated:

> Your request is not accepted and the Letter of Determination issued to you by our field office has become the final determination of the Commission. The Commission's administrative processing of your charge has been terminated.
>
> Should you wish to pursue this matter further, you may do so by filing suit under Title VII in Federal District Court against the Respondents named above. Any such suit must be filed within 90 days of the effective date of dismissal, as discussed in the Letter of Determination. Therefore, if a suit is not filed by January 12, 1990, your right to sue will be lost.

Defendant's Ex. 10 attached to its brief in support of its motion for summary judgment. Plaintiff testified she received the Review Program's rejection on Jan. 12, 1990. Plaintiff's complaint in the present case was filed on January 17, 1990.

Defendant argues that Plaintiff's Title VII is barred by the statue of limitations for either of two reasons. First, it alleges that Plaintiff's charge of discrimination was filed outside the 300-day period for filing under 42 U.S.C.§2000e-5(e). The statue provides as a general rule that a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleg-

ed unlawful employment practice. Id. If a complainant initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged, the time limit for filing with EEOC is extended to 300 days. Id. The Act further provides that no charge may be filed with EEOC until 60 days have elapsed from initial filing of the charge with an authorized state or local agency, unless that agency's proceedings have been earlier terminated. 42 U.S.C.§2000e-5(c). Because of the 60-day referrall period, a complainant must file a charge with the appropriate state agency, or have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory act in order to ensure that it may be filed with the EEOC within the 300-day limit. Mohasco Corp. v. Silver, 447 U.S. 807 (1980). If the complainant does not file within 240 days, the charge may still be filed with

EEOC within the 300-day limit. Id"Termination" of state proceedings has been held to include a waiver of a right to initially process a charge of discrimination. See EEOC v. Commercial Office Prods. Co 486 U.S.107 (1988).

In the present case, Oklahoma has a work' sharing agreement with EEOC. Thus, provided Plaintiff is able to meet the 300-day requirement as outlined above, her charge of discrimination was timely filed.

The limitations period for filing a claim with EEOC begins to run on the date the plaintiff receives notice of the allegedly discrimination act, not the date the decision actually takeseffect. Tadros v. Coleman, 717 F. supp. 996 (S.D.N.Y. 1989) affirmed 898 F2d 10 (2nd Cir. 1990). If there is some question concerning when plaintiff received notice, the limitations period begins to run from the time plaintiff reasonably should know that the act occurred.

McWilliams v. Escambia County School Bd., 658 F2d 326 (5th Cir. 1981)

Here the evidenc indicates that notice was sent to plaintiff June 24, 1985. However, in her deposition, Plaintiff denied ever having received such notification although it was sent to her current address. See Defendant's Ex. 1 attached to its brief in support of motion for summary judgment. Plaintiff further admitted that even though she did not recall seeing the June 24, 1985 letter, she was told on the phone that the position had been filled. But she does not remember when this conversation took place. Id Since the evidence is such that a precise date for the telephone conversation cannot be fixed, the only evidence on this issue is the June 14, 1985 letter. Allowing three days for time in the mail, the date on which the 300-day periiod begins to run is June 27, 1985. Three hundred days from June 27, 1985 is April 24, 1986.

The evidence in this case shows that the Oklahoma Human Rights Commission deferred processing of Plaintiff's charge and notified EEOC of such on April 23, 1986, the 299th day. The court therefore findss that Plaintiff's charge was indeed filed within the statutory period.

Defendant next argues that Plaintiff filed her complaint in this court outside the EEOC-imposed January 12, 1990, filing date set forth in the EEOC determination letter; consequently, her Title VII is time-barred. The record indeed reflects that Plaintiff's complaint was filed on January 17, 1990. Plaintiff in turn, argues that equitable tolling should apply to toll period for filing for two reasons. First, she urges that the finality of the determination letter was contingent upon her request for review from the Determinations Review Program was improper. Second, she argues that she was

misled into thinking the determination was being reviewed until January 12, 1990, when she received notice from the Determinations Review Program that her review was rejected for having been untimely filed.

The United States Supreme Court has rec that limitations period for actions brought under Title VII are not jurisdictional and may be subject to equitable tolling. Zipes v. Transworld Airlines Inc., 455 U.S. 385 (1982) Equitable tolling is appropriate only where the circumstances of the case rise to a level of active deception sufficient to invoke tne powers of equity. For instance, equitable tolling may be appropriate under the following circumstances:

1. Plaintiff has received inadeq. notice;
2. a motion for appointment of counsel is pending;
3. the court has led the plaintiff to believe that she has done everything required of her;
4. affirmative misconduct on the part of of a defendant lulled plaintiff in inaction.

See Balwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984).

Addressing Plaintiff's first argument, the court findssher position unpersuasive. Plaintiff offers no case law or other argument in support of her position. Absent an argument baseddeither on law or public policy, the court is unwilling to conclude that EEOC's actions in this case were improper.

Moreover, the court determines that the September 24, 1989 letter to Plaintiff very clearly stated her further responsibilities. She was required to either request review by letter delivered or postmarked by October 13, 1989, or file suit by January 12, 1990. Plaintiff did neither. Therefore, the court failssto see how P Plaintiff could have been misled by the review program's action. A review of the record reveals no circumstance or action on the part of EEOC or defendant which would constitute a sufficient ground for for equitable tolling.

Accordingly, Plaintiff's Title VII claim should be dismissed. As there are no remaining claims, this action should be dismissed in its entirity.

WHEREFORE, IT IS ORDERED THAT, defendant, Rose State College's motion for summary judgment is GRANTED,and hhis action is DISMISSED in its entirety. Accordingly, the trial date currently set for April 8, 1991 is hereby striken.

Dated this 5th day of April, 1990

Signed Luther Bohanon, United States District Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

W. M. Scheerer
W. M. SCHEERER, Filed June 15, 1990
Plaintiff
vs
No. CIV 90-101-B
ROSE STATE COLLEGE, DONALD BURRIS, EEOC, AND EVAN KEMP, Dir. Equal Employment Opportunity Comm ission, DEFENDANTS

ORDER GRANTING MOTION TO DISMISS

On March 19, 1990, Defendant, Equal Employment Opportunity Commission (EEOC)' filed a motion to dissmiss Plaintiff's

complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, respectively. Plaintiff amended her original complaint on April 25, 1990, and on May 11, 1990, the EEOC reasserted its motion to dismiss. According to Local Rule 14(A), Plaintiff;s response to said motion was due within fifteen (15) days, orby May 26, 1990.

No response has been filed to date, and no request for an extension of time has been made. Thus, Defendant, EEOC's motion to dismiss pursuant to Fed.R. Civ. P. 12(b)(1) and 12 (b)(6) is deemed confessed. It is so ORDERED

Dated this 15th day of June, 1990.

Signed: Luther Bohanon, United States District Judge

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APPENDIX D RULES

Rule 38, U.S.C.S. Preserves right of trial by jury.

Rule 52 N. 106 Although it is not for appellate court to substitute its judgment on disputed issues of fact for that of trial court where there is substantial credible evidence to support its findings, appellate court may reverse where, if there is evidence which is credible would be substantial, force, and effect of testimony considered wa whole convinces that finding is so against great preponderance of credible testimony that it does not reflect or represent truth and rights of case.

Rule 52N122 : Although Rule 52(a) and its clearly erroneous test is applicable to decisions of motions under Rule 12, fact findings of trial judge on which he based his decision of motion can be disregarded where only evidence before him was documentary.

Rule 52N.123: Appellate Court is not bound by District Court's credibility evaluation of witnesses where evidence is submitted by deposition or in other documentary form and where District

Court did not observe any witnesses, but based its decision only on transcript of hearing before judge and other documentary evidence; clearly erroneous standard of review is not applicable and appellate court is free to render independent judgment on factual matters.

Rule52N.216: Finding of discrimination or nondiscrimination in employment is finding of ultimate fact and Appellate Court would proceed to make independent determination, free of clearly erroneous rule, although bound by findings of subsidiary fact which were themselves not clearly erroneous.

N. 223: District Court's finding that plaintiff failed to establish prima facie case of racial discrimination is clearly erroneous where plaintiff proved that he is a balck male who had had two year course in electronics technology coupled with 11 years experience at time he applied for job as electronic technician and was refused employment; plaintiff is not required to prove that he was most qualified applicant for the position but only that he was at least presumptively qualified.

Rule 52 Cont.

N 223: Finding of trial judge in racial discrimination in employment action under Title Vll (42 USCS§2000e et seq) that action filed on June 3, 1983 was commenced within 90 days after receipt of right to sue was not clearly erroneous when based upon reasoning that letter dated March 4, 1983, even if mailed on that date, would not have reached plaintiff before the following day.

Rule 56

N. 135: Party moving for summary judgment bears burden of demonstrating absence of genuine issue as to any material fact, and even where his opponent comes forth with nothing, summary judgment must be denied if facts supporting motion do not establish nonexistence of such issues.

N. 129: Parties moving for summary judgment have burden of showing that there is no genuine issue of fact, regardless of whether they or their opponent would have burden of proof at trial and whether they are required to show existence of nonexistence of facts. Rule 56 does not require that plaintiff prove each element of his case or suffer summary judgment against him; rather de-

fendant, in order to have summary judgment entered in his favor, must prove that he is entitled on basis of undisputed facts. In making determination as to whether genuine issue as to any material fact exists for purposes of disposing of motion made under Rule 56, Court must be mindful that:(1) movant has burden of showing absence of genuine issue as to any material fact;(2) evidence must be viewed most favorable to opposing party.

N. 140: On motion for summary judgment it is the moving party who carries burden of proof; he must show that there are no genuine issue of material fact exists and this is true even though at trial his opponent would have burden of proving facts alleged. Burden is on the moving party to establish that there is no genuine issue of fact and party opposing motion should be given benefit of every reasonable inference that can be made from evidence in his favor. Summary judgment is extreme remedy which is not to be entered unless movant has established that he has right to judgment with such clarity as to leave no room for controversy, and that other party is not entitled to recover under any discernable circumstances. Movant for

summary judgment bears burden of showing both that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Defendant, seeking order of summary judgment in his favor, has burden of affirmatively demonstrating that with respect to every essential issue of each count in complaint, there is no genuine issue of fact, even though issues are those which plaintiff would have burden of proof should case go to trial.

Rule 60: This rule vests court with broad equitable power to grant relief from final judgment or order including new trial. It is a legal remedy in court of law. Rule 60 is appropriate to vacate judgment when such action is appropriate to avoid injustice in light of all facts, but application of relief under Rule must be clearly substantiated by adequate proof. "Vehicles of injustice are not to be left standing".

Rule 65

N. 108: On appeal from order granting defendant's motion for summary judgment, Court of Appeals must give plaintiff benefit of every doubt. On review, Supreme Court will look at record of sum-

mary judgment in light most favorable to party opposing motion for summary judgment.

N. 603: In reviewing grant of motion for summary judgment, Court of Appeals is not bound by findings of trial judge and must undertake independent review of record.

N. 608: While on appeal from summary judgment record must be read in light most favorable to party opposed to motion, Appellate Court at same time is bound by material facts which are without genuine dispute. Appellate Court reviewing summary judgment views evidence in manner most favorable to losing party.

* *

EXHIBIT E

DETERMINATION REVIEW PROGRAM

P. O. Box 1554
P.O. Box 1554
Oklahoma City, Ok. 73101
July 9, 1989

Determination Review Program
EEOC Office of Program Operations
2401 E. Street, N.W.
Washington, D. C. 20507

Charge 311860861

Dear Sir:

This is to request a review of the findings of the local EEOC Office. The finding is unjust; I am enclosing a copy of my letter from Jacquelyn Bradley, Dallas.

Sincerely,

Dr. W. M.Scheerer

Confirmed receipt: 7/18/89 entered as Exhibit 4A on Appeal

NOTE: There was never a response from EEOC regarding request until January 12, 1990

FILED
MAY 28 1992
OFFICE OF THE CLERK

(2)

No. 91-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

W.M. SCHEERER,
Petitioner,

V.

ROSE STATE COLLEGE AND EEOC,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May, 1992

QUESTIONS PRESENTED

Pursuant to Rule 24, Supreme Court Rules, Appellee/Defendant, Rose State College submits that the following question is presented for review with respect to matters involving Rose State College:

1. Did the U.S. Court of Appeals for the Tenth Circuit err in affirming the District Court's granting of Rose State College's Motion for Summary Judgment by determining that Plaintiff/Appellant's claims were untimely filed. Specifically, the U.S. District Court for the Western District of Oklahoma granted summary judgment to Defendant to Rose State College finding that Plaintiff/Appellant's Title VII claim of race discrimination was untimely filed under 42 U.S.C. §2000e-(5)(f)(1). The U.S. Court of Appeals for the Tenth Circuit affirmed this ruling, finding no "active deception" to warrant equitable tolling, citing, *inter alia, Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied,* 110 S.Ct. 54 (1989).

2. Citations of Opinions and Judgments Delivered in the Court Below.

Pursuant to Rule 24, citations of the opinions and judgments delivered in the courts below are presented herein:

1. In the United States Court of Appeals for the Tenth Circuit, dated December 4, 1991, No. 91-680, the Court affirmed the judgment of the United States District Court for the Western District of Oklahoma in favor of all Defendants.

2. In the United States District Court for the Western District of Oklahoma, No. CIV-90-101-B,

an Order Granting Motion for Summary Judgment was issued on April 5, 1991, rendering judgment for Rose State College.

3. Jurisdiction

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §2000e-(5)(f) and 42 U.S.C. §2000e-(5)(j), following an opinion by the U.S. Court of Appeals for the Tenth Circuit, filed December 4, 1991.

4. Applicable Statutes

The United States statutory provisions specifically applicable are contained in 42 U.S.C. §2000e-(5)(f)(1), and (j) which are set forth in their entirety in the Appendix.

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No. 91-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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Petitioner,

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ROSE STATE COLLEGE AND EEOC,
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Petition For A Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Nature of Proceedings

This cause arises from allegations of racial discrimination committed by Rose State College, an Oklahoma state junior college, for failing to hire Plaintiff/Appellant for the position as Instructor/Director of the School of Nursing in 1985.

The Plaintiff filed a charge with the EEOC and the Oklahoma Human Rights Commission. In

1989, the EEOC issued a letter of "Determination," not finding acts of discrimination by Rose State College and notifying Plaintiff of her right to sue. Plaintiff then filed this suit in District Court against Rose State College and the EEOC. The College then filed a Motion for Summary Judgment as to all claims of Plaintiff which was sustained in its entirety. Plaintiff brought this Appeal to the U.S. Court of Appeals for the Tenth Circuit from the Orders of Dismissal of the EEOC and employees and the Order Granting Motion for Summary Judgment rendered April 5, 1991.

On December 4, 1991, the U.S. Court of Appeals for the Tenth Circuit issued its Opinion, affirming the rulings of the District Court on all matters. With respect to the issues involving 42 U.S.C. §2000e-(5) and Rose State College specifically before this Court, the Court determined that Plaintiff/Appellant's action was untimely filed and that there were no circumstances or facts present which would have invoked an equitable tolling of the filing deadline. To this point, the Tenth Circuit determined that the "mandatory nature of both the January 12, 1990, deadline and the time limitation on the only exception thereto was made abundantly clear by EEOC."

Plaintiff/Appellant brings this Petition for Certiorari from that Opinion, apparently confining her Petition, with respect to Rose State College, to that portion of the Opinion addressing her Title VII claim. (See "Perceived Misstatements of Law and Fact" for additional discussion of this matter).

B. Brief Statement of the Facts

Plaintiff applied for the announced position of Instructor/Director of the School of Nursing at Rose State College in January, 1985. The Nursing Program had been established in approximately 1980 by a black female who, according to Mr. Dan Points, Chairman of the Health Sciences Division, had done an excellent job and with whom they were extremely pleased. She had vacated the position for personal reasons. Plaintiff was interviewed on or about January 21, 1985, by Mr. Points, but was not hired for reasons totally unrelated to race. The College hired a woman receiving her Master of Science Degree in Nursing that Summer of 1985 with experience within the State and Junior College Higher Education system. The College offered the position to the person selected in May, 1985, and notified the Plaintiff by letter dated June 24, 1985, that another person had been formally hired for the position at the meeting of the Board of Regents on June 20, 1985. Plaintiff did not file a Charge of Discrimination until March 26, 1986.

After investigation and various correspondence, the EEOC in Oklahoma City issued a letter to Plaintiff on September 18, 1989, advising her of the reasons as reflected on the record that she was not hired, not finding discriminatory action by Defendant Rose State College, and advising her that any other information must be received within 10 days of the date of the letter. On September 24, 1989, the Oklahoma City EEOC office then sent a "Determination" letter to the Plaintiff, again not finding discriminatory action by Defendant Rose State College, stating the

reasons shown by the records that Plaintiff had not been hired, and notifying her that a Request for Review must be submitted to Washington D.C. by October 13, 1989, or that any suit must be filed by January 12, 1990, or her right to sue would be lost. The letter explicitly stated that she would receive no further notice of her right to sue. Plaintiff responded by typing her comments at the bottom of the September 18th letter and sending this document to the Washington D.C. office. The EEOC never gave Plaintiff any indication that either the October 13 or the January 12 dates had been changed or extended. Even though the EEOC letter contained notification of the October 13 deadline, the stamp of receipt by the EEOC Office indicates that the comments, typed at the bottom of the September 18, letter and sent to the Washington D.C. office, apparently intended to be a "request for review," were not received until October 27, 13 days past the deadline. The EEOC sent Plaintiff a letter to her Post Office Box mailing address, dated January 5, 1990, titled "Rejection of Untimely Request for Review (Title VII)," advising Plaintiff that her Request for Review was not submitted within the required time frame (October 13, 1989), and the request had not been accepted. The letter reiterated that the Determination letter had become final and again stated that Plaintiff must file any suit by January 12, 1990, or the right to sue would be lost.

Plaintiff filed her suit Pro Se January 17, 1990, naming Rose State College and Donald Burris, and the EEOC, as Defendants. By April 25, 1990, Plaintiff had retained an attorney who filed an Amended Petition and, on or about April

23, 1990, Plaintiff obtained permission from the Court to add Evan J. Kemp, Jr., Chairman, EEOC, as an additional party Defendant. On or about June 15, 1990, the EEOC was dismissed from this case, and on or about November 5, 1990, Evan Kemp and Donald Burris were dismissed for reasons as stated in the respective Orders of the District Court.

Plaintiff brought this action against Rose State College pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. §2000e-(2)(e),* and *42 U.S.C. §1981,* to secure a plaintiff's right to make and enforce contracts. Jurisdiction of the Court was invoked pursuant to the Thirteen Amendment to the United States Constitution, 42 U.S.C. §2000e(5)(f), 28 U.S.C. §1331, 28 U.S.C. §1343(3)(4), 20 U.S.C. §1681, 20 U.S.C. §1684, and pending state claims. Plaintiff also invoked the jurisdiction of the Court to secure protection of and to redress deprivation of rights secured by 42 U.S.C. §2000e, et seq., providing for injunctive and the other relief against racial, religious, national origin, and sex discrimination in employment. Plaintiff also sought declaratory relief under 28 U.S.C. §2201 and §2202, alleging that she had been discriminated against on the basis of race, by the Defendant Rose State College. The sole support of Plaintiff's Charge is based upon her assertions that the person hired for the faculty position had less education and less experience and did not even live in the vicinity.

Defendant has affirmatively and emphatically denied that it committed any acts of discrimination and further asserts that Plaintiff's charge is barred by the statute of limitations and

that Defendant is entitled to Judgment as a matter of law as to all of Plaintiff's claims for the reasons stated herein as determined by lower Courts.

Defendant, Rose State College, submitted a Motion for Summary Judgment to the District Court asserting that it was entitled to judgment as to all of Plaintiff's claims, summarily described as follows:

1. Plaintiff's §1981 claim is barred by a two year statute of limitations, pursuant to Oklahoma State Law governing injuries to rights to another not arising from contract and is not tolled by Title VII actions, and the claim is barred by the Eleventh Amendment;

2. Plaintiff's claims under 20 U.S.C. §1681 and §1684 are inapplicable on the grounds that neither sex discrimination nor blindness is an issue in this matter;

3. Plaintiff's claim under 42 U.S.C. §1982 is unavailing on the grounds that §1982 does not apply to employment discrimination cases;

4. Plaintiff's claim under Title VII is barred by the statute of limitations and because Plaintiff has failed to meet her burden of proof.

In Plaintiff's Response, she alleged that she did not receive the January 5, letter sent to her Post Office Box until 3 p.m. Friday, January 12, and could not file a Petition until the following Wednesday, January 17, because of the Monday holiday. However, she offered no evidence to indicate that the letter had only arrived at her Post Office Box on January 12, nor anything to

indicate that the EEOC had ever advised or misled her into thinking that the January 12, 1990, filing date had been extended.

On or about April 5, 1991, the District Court granted Defendant Rose State College's Motion for Summary Judgment for the reasons summarized as follows:

1. Plaintiff's claims under §1981 and §1982 are time barred.

2. Plaintiff wholly failed to respond to Defendant's arguments regarding Plaintiff's claims brought pursuant to 20 U.S.C. §1681 and §1684 and these claims are therefore deemed waived or abandoned by Plaintiff.

3. Plaintiff's claim brought pursuant to Title VII is time barred and no grounds were presented by Plaintiff to invoke equitable tolling.

Plaintiff brought this Appeal to the U.S. Court of Appeals for the Tenth Circuit, with respect to Rose State College, from the District Court Order granting Motion for Summary Judgment. The U.S. Court of Appeals for the Tenth Circuit affirmed the ruling of the District Court on December 14, 1991, and Plaintiff/Appellant has brought this Petition for Certiorari from that ruling.

Following the Order granting Defendant's Motion for Summary Judgment, Plaintiff's attorney filed a Motion to Withdraw as Attorney of Record for Plaintiff. This Motion was granted and Plaintiff/Appellant has brought her Appeals Pro Se.

ARGUMENT AND AUTHORITIES

I. PLAINTIFF'S CLAIM BROUGHT PURSUANT TO TITLE VII IS BARRED IN ITS ENTIRETY BY THE STATUTE OF LIMITATIONS AND DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AS DETERMINED BY THE COURTS BELOW AND THIS PETITION FOR CERTIORARI SHOULD BE DENIED.

Although the Standard of Review in Title VII cases has been determined to be governed by the "clearly erroneous" rule (*Verniero v. Air Force Academy Sch. Dist. No. 20,* 705 F.2d 388 (10th Cir. 1983); *Thorton v. Coffey,* 618 F.2d 686 (10th Cir. 1980), this case was decided by the District Court pursuant to Fed. R. Civ. P. 56, upon Defendant Rose State College's Motion for Summary Judgment. Pursuant to *Clark v. Atcheson, Topeka & Santa Fe Ry. Co.,* 731 F.2d 698 (10th Cir. 1984), the standard of review before the Tenth Circuit is therefore the same as that of the District Court; i.e., a determination of whether any genuine issue of material fact exists and whether the substantive law was correctly applied.

The Defendant, Rose State College, is an Oklahoma educational institution, governed and controlled by the State of Oklahoma. Plaintiff applied for the position of Instructor/Director of Nursing in the Health Science Division of Rose State College, in January, 1985, pursuant to an advertisement for the published position as set forth in the Brief in Support of Motion for Summary Judgment (R. Doc. 37 at Ex. 1 and 2). Plaintiff was not hired for this position, as set forth in the letter from the Defendant to Plaintiff dated

June 24, 1985. (R. Doc. 37 at Ex. 3). Plaintiff filed a charge with the EEOC and the Oklahoma Human Rights Commission on or about March 26, 1986 alleging that she was denied employment because of her race. (R. Doc. 37 at Ex. 4). The EEOC issued a Notice of Right to Sue dated June 6, 1989, which states that the Plaintiff must file suit within 90 days from receipt of the Notice or the right to sue is lost. The EEOC indicated that the Right to Sue letter was being issued because Plaintiff's Charge was untimely filed with the Commission. (R. Doc. 37 at Ex. 5). In a letter dated June 9, 1989, Plaintiff wrote Donald Burris, Area Director of the EEOC, acknowledging receipt of the Notice of the Right to Sue and "rejecting" the dismissal of the Charge. (R. Doc. 37 at Ex. 6). In a letter dated August 24, 1989, Jacklyn Bradley, District Director of the EEOC wrote Scheerer granting a request for the reopening of the Charge for the limited purpose of gathering information regarding the timeliness of the Charge. (R. Doc. 37 at Ex. 7). However, the EEOC reviewed the merits of the charge, and in a letter dated September 18, 1989, Donald Burris, EEOC Director, wrote Scheerer setting out his analysis of the matter and finding no discrimination committed by Rose State College. (R. Doc. 37 at Ex. 8). On September 24, 1989, Donald Burris again wrote Dr. Scheerer a document titled "Determination," again finding no discrimination committed by Rose State College and advising Dr. Scheerer of the procedures to be followed if she wished to have the determination reviewed. (R. Doc. 37 at Ex. 9). The document states in pertinent part:

If the Charging Party wishes to have this Determination reviewed, she must submit a signed letter to the Determination Review Program which clearly sets forth the reason for requesting the review and which lists the Charge Number and respondents name. Charging Party must also attach a copy of this Determination to her letter.

These documents must be personally delivered or mailed (post marked) on or before *October 13, 1989,* to the Determinations Review Program, Office of Program Operations Equal Employment Opportunity Commission, 1801 L Street, Northwest Washington D.C. 20507. It is recommended that some proof of mailing such as certified mail receipt be secured.

The document also states:

If the Charging Party does not request a review of this determination by October 13, 1989, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission.) FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by January 12, 1990, the Charging Party's right to sue will be lost. The Commission's regulations governing

no cause determinations are printed in Title 29, Code of Federal Regulations, Section 1601.19.

Plaintiff then typed a letter at the bottom of the second page of the September 18, 1989, letter received from Dr. Burris, addressed the letter to the Administrator of the Determinations Review Program, and sent that to the Washington D.C. Office. The "Received" stamp from the Determinations Review Program on the document indicates that it was received October 27, 1989, 14 days past the October 13, deadline. (Defendant would advise the Court that the hand written comments contained on this document were on the document furnished to Defendant by the EEOC Office).

Plaintiff now seems to assert, on page 6, that she submitted her request for review in July and it was, therefore, timely. This position must fail for the following reasons: 1) This argument is brought for the first time on appeal and must be rejected on that ground alone. *Cain v. Yukon Public Sch. Dist. I-27*, 775 F.2d 15 (10th Cir. 1985); *Clark v. Atcheson, Topeka & Santa Fe Ry. Co.*, 731 F.2d 698 (10th Cir. 1984). 2) The "Notice of Right to Sue" to which Plaintiff refers (R. Doc. 37 at Ex. 5) was issued June 6, 1989. Plaintiff responded to this letter by writing Burris, EEOC Oklahoma City, to "reject [his] dismissal of [her] charge." (R. Doc. at Ex. 6) The Charge was reopened for the stated "limited purpose of reviewing the timeliness" of the charge. However, the entire matter was subsequently reviewed (R. Doc. 37 at Ex. 7). The previously referenced letters of September 18, and September 24 represented closure in this matter by the EEOC. This argument is spurious

and unavailing. The District Court did not base its ruling upon the June 6 Right to Sue letter. The EEOC had already extended Plaintiff's time from September (90 days from June 6) to January 12.

In her Appellant's Brief, Plaintiff asserts that the lower Courts relied upon "flawed" evidence. In her Brief to the Tenth Circuit, Plaintiff asserted that a letter was "mistakenly identified" and refers to a "flawed" deposition (apparently referring to her own deposition). If Plaintiff is referring to the "Determination" letter of September 24, 1989, then Defendant Rose State College would advise the Court that Plaintiff stipulated to the issuance of the September 24 "Determination" letter in the two Joint Status Reports, filed September 24, 1990 and January 3, 1991, with the District Court (R. Docs. 30 and 34; Part II, Stipulations, Para. 6). Additionally, in her "Brief in Support of the Objection to Defendant Rose State College Motion for Summary Judgment," (R. Doc. 37, p.3-4, Para. 13 and 14), Plaintiff states that she responded to the "Determination" letter by typing on the bottom of the September 18, letter. In that response, Plaintiff also states that the "Determination" letter required that a request for review " 'be personally delivered or mailed, post marked' " on or before October 13, 1989. Plaintiff cannot now attempt to state that this letter was "mistakenly identified" or that "flawed evidence" was introduced or that any deception was practiced before the Court by Rose State College.[1] Michael Doughtery, Acting

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[1] For purposes of additional clarity, Defendant would advise this Court that Plaintiff identified this Document during her Deposition (Scheerer, October 13, Depo. p. 65, ll.12-25; pp. 66 ll.1-8; p. 71 ll.5-25; p. 72, ll.1-25) stating that she

Director of the Determinations Review Program, sent Plaintiff a document titled "Rejection of Untimely Request for Review (Title VII)," dated January 5, 1990, (R. Doc. 37 at Ex. 10) stating that the Request for Review was not mailed within the designated time frame and the letter of Determination had become the final action of the Commission. That document also restated the January 12, 1990, filing deadline date. (90 days from the October 12 deadline); (See 42 U.S.C. §2000e-(5)(f)(1)). There was no other written correspondence between Plaintiff and the EEOC between September and January. Plaintiff then filed this action January 17, 1990, five days past the filing deadline.

Plaintiff's action is untimely because Plaintiff failed to file the action within the time frame as set forth in the September 24, 1989, Determination letter sent by Mr. Burris which clearly states that any lawsuit must be filed by January 12, 1990, and that any request for review must be made by October 13, 1989. Plaintiff received nothing from the EEOC which would indicate that the filing date of January 12, 1990, had been extended. Even if her typewritten note at the bottom of the September 18, letter which was sent to the Washington D.C. Office could be considered a "request for review," it was not received by the Washington Office until October 27,

---

had received the September 24 Determination letter and had written her response on the bottom of the September 18, 1989, letter. The Deposition was then continued until the following week. At that time, the Plaintiff contradicted her earlier testimony by stating that she had not received the "Determination" letter. (Depo. Scheerer, Oct. 10, 1990, p. 37, ll.5-25; p. 38, ll.1-25; p. 39, ll.1-2). Excerpts from the Plaintiff's Deposition containing this contradictory testimony were presented to the Tenth Circuit, in full disclosure by Rose State College, and are presented here as Appendix D as an aid to this Court.

1989, approximately two weeks after the October 13, deadline for review had passed. Plaintiff said that she received the January 5, 1990, rejection of the Request for Review on January 12, 1990, and filed the suit on January 17, as soon as possible. This statement is a misrepresentation of the facts. That notification merely reiterated the January 12, 1990, filing deadline of which she had been previously notified in September. (See 42 U.S.C. §2000e-5(f)(1)).

The Plaintiff argued that the finality of the Determination letter was improper and that she was misled into thinking that the deadline for filing suit had been extended. However, Plaintiff cited no authority for her assertions that the Determination letter was improper. Defendant/Appellant Rose State College asserts that the referenced letter fulfills the requirements of notice set forth in 42 U.S.C. §2000e-5(f)(1) which states, in pertinent part, that if the commission has not filed a charge, then the commission "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent." Such notice is explicitly contained in the document. The District Court addressed the issue involving the alleged impropriety of the EEOC's actions and correctly determined that Plaintiff had offered no support for the assertion that the actions of the EEOC involving the Determination letter were improper, and, absent such authority, the District Court would not reach such a conclusion. The District Court then determined that the 90 day filing period is not jurisdictional. With respect to equitable tolling, and in accordance with the Court's determination in *Carlile v. South*

Routt Sch. Dist. RE 3-J, 652 F.2d 981, 985 (10th Cir. 1981), the District Court also determined that "[e]quitable tolling is appropriate only where the circumstances of the case rise to a level of active deception, sufficient to invoke the powers of equity," citing *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385 (1982) and *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984). (R. Doc. 50 at p.11).

In Plaintiff's case the Determination letter clearly stated that Plaintiff must request a review of the Determination by October 13, 1989, or file suit by January 12, 1990. The letter also states that "This letter will be the only notice of dismissal and the only notice of the charging party's right to sue sent by the Commission." As the District Court correctly determined, Plaintiff neither submitted her request for review nor did she file suit in a timely manner. The EEOC did nothing to lull Plaintiff into inaction or lead her to believe that either of these deadlines had been extended. Plaintiff had been clearly advised of the consequences if these deadlines were not met and notice that she had failed to comply was unnecessary. The notice and deadlines were clear and Plaintiff failed to abide by them. Equitable tolling is not justified, and the ruling of the District Court should be affirmed. *Melendez v. Singer – Freden Corp.*, 529 F.2d 321 (10th Cir. 1976); *Cottrell v. Newspaper Agency Corp.*, 590 F.2d 836 (10th Cir. 1979).

Plaintiff offers no evidence to support her contentions that she mailed the request for review on or before October 13. She cannot remember the date even though the Determination let-

ter explicitly advises the charging party to obtain proof of mailing. Plaintiff had no reason to assume that a belated request for review would toll explicit deadlines.

The Court of Appeals for the Tenth Circuit affirmed the ruling of the District Court, concluding that the circumstances of this case did not warrant equitable tolling. Citing *Johnson v. U.S. Postal Service*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied*, 110 S.Ct. §54 (1989), the Court determined that the filing deadline was made "abundantly clear by EEOC," that there was neither "active deception nor any of the misleading ambiguity it deemed sufficient to warrant equitable tolling in *Martinez v. Orr*, 738 F.2d 1107, 111-12 (10th Cir. 1984)."

Plaintiff has offered nothing to support the invocation of equitable tolling in this matter. She states that she did not receive the January 5 letter until January 12 afternoon. She also alleges that the letter was "double postmarked" January 8 and 9 and "manipulated" to reach her on the 12th. However, Plaintiff offers no evidence to support these assertions at all. Nor does Plaintiff assert that she visited the post office box before 3:00 in the afternoon of January 12, and the letter was not in the box. As a post office box patron, Plaintiff would not know that she had received any mail until she actually retrieved it from the postal box site which can be at any time. Even if these assertions were so, it would not alter the situation. The January 12 letter merely reiterated the filing date which had been given Plaintiff in September and had never been changed.

Plaintiff offers nothing to suggest that she was misled into thinking that the deadline had been extended. There is no deception in this case. Plaintiff has asserted nothing to meet any criteria so as to justify equitable tolling in this matter. The District Court and the Appellate Court correctly determined that there are no circumstances or action on the part of EEOC or Defendant College which could constitute a sufficient ground for equitable tolling. The rulings of the District Court and the Tenth Circuit should be affirmed and Plaintiff's Petition for Certiorari should be denied.

Equitable tolling is not appropriate in the instant case, in accordance with the referenced cases and the determination by the U.S. Supreme Court in *Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 80 L.Ed 2d 196, 202, 104 S.Ct. 1723 (1984) that "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

PERCEIVED MISSTATEMENTS OF LAW AND FACT

Plaintiff's Petition, as were her Briefs to the Tenth Circuit, is replete with matters not presented to the District Court and accusations of wrongdoing by counsel for Rose State College and by her own counsel before his withdrawal. These accusations are totally without basis or merit. Rose State College has attempted to confine its response to the issues properly before this Court and will not respond further to these "new issues" and false allegations unless so instructed by this Court, except to affirmatively state that there has been no fraud, conspiracy,

theft, deception or any other improper action whatsoever presented or practiced before this Court, the U.S. Court of Appeals for the Tenth Circuit, or the U.S. District Court for the Western District of Oklahoma. Appellant's arguments appear primarily to relate to her dissatisfaction with the decision of the District Court and that of the Tenth Circuit, her dissatisfaction with opposing Counsel and her own Counsel, her misunderstanding of the discovery process, and to her attempt to litigate the merits of the hiring decision of Rose State College *de novo* in an appellate court. These matters are irrelevant to the holding of both lower courts that this cause was untimely filed and to a consideration of whether the Petition for Certiorari should be granted. Appellant includes numerous factual matters and assertions not previously presented to the District Court and with which Rose State College would affirmatively disagree. However, matters which are presented first on appeal in an attempt to supplement the case and which were not introduced in the proceedings below cannot be considered by the Court on appellate proceedings. *DeShaney v. Winnebago County DSS*, 109 S.Ct. 998 (1989), 1003, fn 2, citing *Youngberg v. Romeo*, 457 U.S., at 316 n. 19, 120 S.Ct., at 2458, n. 19; *Dothard v. Rawlenson*, 433 U.S. 321, 323, n.1, 97 S.Ct. 2720, 2724, n. 1 53 L.Ed.2d 786 (1977); *Duigan v. United States*, 2740 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927); *Old Jordan Mining and Milling Co. v. Socrete Anonyme des Mines*, 16 U.S. 261, 264-265, 17 S.Ct. 113, 114-115, 41 L.Ed. 427 (1986). Rose State College respectfully requests that this extraneous information be disregarded and stricken. (Fed. R. Civ. P. 24 (.6)).

BEST AVAILABLE COPY

Rose State College would also advise this Court that the decision of the Tenth Circuit as included in the Appendix sent to the College by Plaintiff attached to the third Petition is incorrectly presented. Specifically, those pages numbered 5 and 6 are not a part of the Tenth Circuit Opinion (Rose State College has determined that these pages are from the Opinion of the District Court) and portions of the Tenth Circuit Opinion have been omitted (i.e., a portion of subsection titled "Dismissal of EEOC;" all of "Dismissal of Individual EEOC Defendants;" the first portion of "Summary Judgment for Rose State College;" note 2; and a portion of note 3). The College does not know if this error exists in copies filed with the Court.

CONCLUSION

The Petition for Certiorari is devoid of any facts or authorities to demonstrate that the decision of the U.S. Court of Appeals for the Tenth Circuit is contrary to existing authority or that it has departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower Court, or resolved a matter of new impression which should be settled by this Court. The Petition for Certiorari is without merit and Rose State College respectfully requests that the Court decline to grant said Petition.

Respectfully submitted,

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May, 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-101-B

W.M. SCHEERER,
Plaintiff,

vs.

ROSE STATE COLLEGE,
Defendant.

[Filed Apr. 5, 1991]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the court is the motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure filed by the Defendant, Rose State College, on March 8, 1991. Plaintiff's response was filed on March 25, 1991. The issues have been fully briefed and are ripe for determination. After careful review of the motion, supporting brief and attached exhibits as well as Plaintiff's response and attached exhibits, the court finds that Defendant's motion for summary judgment should be granted as to each of Plaintiff's claims.

Plaintiff, Wynelle Scheerer's, complaint results from Defendant's failure to hire Plaintiff as Director of Nursing, a decision which Plaintiff claims was based on discriminatory hiring practices. This court's jurisdiction is invoked under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §§ 2201 and 2202. Plaintiff brings her action under Title VII, 42 U.S.C. §2000e, as amended, as well as 42 U.S.C. §§ 1981 and 1982, and 20 U.S.C. §§ 1681 and 1684. Defendant's motion for summary judgment addresses each of these claims.

Standard of Review

The standard for granting summary judgment is expressed in Rule 56 of the Federal Rules of Civil Procedure. This rule provides that judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When a motion for summary judgment is made, the party opposing the motion may not rest on the pleadings or on mere allegations or denials, but "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 56(e). The adverse party must present sufficient evidence that his claim has merit. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). On a summary judgment motion, the court is required to pierce the pleadings and evaluate the actual proof to determine whether summary judgment is appropriate. Fed.R.Civ.P. 56 (Advisory Committee Notes).

I. 20 U.S.C. §§ 1681 and 1684 Claims

As a preliminary matter, Plaintiff has wholly failed to address Defendant's argument with respect to her claims brought pursuant to 20 U.S.C. §§ 1681 and 1684. Therefore, the court deems Plaintiff to have waived or abandoned those claims. Defendant's motion for summary judgment is granted as to those claims arising under 20 U.S.C. §§ 1681 and 1684.

II. 42 U.S.C. §§ 1981 and 1982 Claims

Second, a review of the record in this case reveals that Plaintiff's claims under 42 U.S.C. §§ 1981 and 1982 are clearly brought outside the applicable statute of limitations with respect to these particular civil rights statutes. Federal civil rights statutes do not specify a statute of limitations for section 1981 and section 1982 actions. Therefore, courts have been

uniformly clear in stating that a federal court should adopt the most analogous state statute of limitations. *Wilson v. Garcia*, 471 U.S. 261 (1985). The characterization of an action for purposes of selecting the appropriate state statute is ultimately a question of federal law. *International Union, United Auto, Aerospace & Agr. Impl. Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In the *Garcia* case, the Supreme Court ruled that section 1983 claims are best characterized as personal injury actions for purposes of selecting the most appropriate state statute of limitations. The Supreme Court has further found that the *Garcia* rationale is equally applicable to claims brought under 1981 since all section 1981 claims are in essence actions for injury to personal rights. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). *See also E.E.O.C. v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984). Likewise, actions brought pursuant to section 1982 are best characterized as personal injury actions. *See Goodman*, 482 U.S. at 660-61 (sections 1981, 1982 and 1983 are all "part of a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person."). Under these holdings, the most analogous Oklahoma statute is the two-year limitations period for injury to the rights of another. *See* Okla. Stat. tit. 12, §95.

Further, Oklahoma law is clear with respect to the accrual of causes of action for claims for injury to the rights of another. Generally, the statute of limitations begins to run when the cause of action accrues, and the test for determining when the cause of action accrues is to ascertain the time when the plaintiff could first maintain her action. *Knudson v. Weeks*, 394 F.Supp. 963 (W.D. Okla. 1975).

In the present case, the court finds that Plaintiff's claim accrued when she was informed that the employment decision had been made and she was not hired. As will be discussed in greater detail *infra.*,

Plaintiff had knowledge that she was not hired for the position in May or June, 1985.[1] The record reflects that Plaintiff's complaint was filed on January 17, 1990, well outside the two-year limitations period.

Moreover, the law is equally clear that filing an administrative claim under Title VII does not toll the statute of limitations on an action brought pursuant to sections 1981 and 1982 concerning equal rights under the law. *Page v. U.S. Indus., Inc.*, 556 F.2d 346 (5th Cir. 1977). The court concludes, therefore, that Plaintiff's claims brought under 42 U.S.C. §§ 1981 and 1982 are time-barred. Consequently, those claims should be dismissed.

III. Title VII Claim

Next, the court addresses Plaintiff's Title VII claim for race discrimination and the effect of the statutory limitations period on her claim. For purposes of analyzing these issues, the court finds the following facts are uncontroverted by the evidence.

On January 5, 1985, Plaintiff responded to an advertisement soliciting resumes for the position of Director of Nursing at Rose State College. She reapplied for the position on May 2, 1985. Plaintiff was notified by letter dated June 24, 1985, and mailed to Plaintiff's address that she was not hired for the position.[2]

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[1] The precise date is not particularly relevant to the present discussion as it will be when the court addresses the limitations period under Title VII.

[2] Plaintiff testified in deposition that she telephoned a representative of the Defendant and was told that someone else had been hired for the position. This conversation occurred somewhere between the date the successful applicant began her employment, the last week in May, 1985, and the date that Plaintiff received the June 24, 1985 letter. There is no evidence, however, with respect to when this occurred. Plaintiff merely testified that she had spoken with someone at the college, but she was unable to recall when that conversation took place. Defendant offers no further evidence on this point.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 26, 1986. The EEOC referred Plaintiff's charge to the Oklahoma Human Rights Commission on April 11, 1986. The state agency indicated that it did not intend to initially process the charge and deferred to the EEOC on April 23, 1986.

The EEOC issued a dismissal and notice of right to sue on June 6, 1989. The EEOC determined that Plaintiff's claim was untimely filed, and therefore, the Commission had no authority to investigate her claim. By letter dated June 9, 1989, Plaintiff informed Donald Burris, Oklahoma City Area Director of the EEOC, that she "rejected" the dismissal of her charge. On August 24, 1989, the District Director of the EEOC notified Plaintiff that her charge was to be reopened for the "limited purpose of acquiring more information on the timeliness of the charge." Defendant's Ex. 7 attached to its brief in support of its motion for summary judgment. However, by letter dated September 18, 1989, Donald Burris addressed the merits of Plaintiff's charge rather than the timeliness issue for which the charge had been reopened. His determination was that there had been no racially discriminatory motive in rejecting Plaintiff for the Director's position. On September 24, 1989, Mr. Burris sent a letter entitled "DETERMINATION" to Plaintiff informing her that her charge had no merit. It further informed her that she could request a review of his determination if she did so before October 13, 1989. The significant language provides:

> This determination does not conclude the processing of this charge. If the Charging Party wishes to have this determination reviewed, she must submit a signed letter to the Determinations Review Program which clearly sets forth the reasons for requesting the review and which lists the Charge

Number and Respondent's name. Charging Party must also attach a copy of this Determination to her letter.

These documents must be PERSONALLY DELIVERED OR MAILED (POSTMARKED) ON OR BEFORE OCTOBER 13, 1989 to the Determinations Review Program . . . IT IS RECOMMENDED THAT SOME PROOF OF MAILING, SUCH AS A CERTIFIED MAIL RECEIPT, BE SECURED.

If the Charging Party submits a request by the date shown above, the Commission will review the determination. Upon completion of the review, the Charging Party and Respondent will be issued a final determination which will contain the results of the review and what further action, if any, the Commission may take. The final determination will also give notice, as appropriate, of the Charging Party's right to sue.

If the Charging Party does not request a determination by October 13, 1989, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission." FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by January 12, 1990, the Charging Party's right to sue will be lost.

Defendant's Ex. 9 attached to its brief in support of its motion for summary judgment (emphasis in second paragraph added).

Plaintiff typed a response to Mr. Burris' letter on the bottom of the September 18, 1989, letter and sent it to the Determinations Review Program in Washing-

ton, D.C., where it was received on October 27, 1990.[3] Defendant's Ex. 8 attached to its brief in support of its motion for summary judgment. On January 5, 1990, the Acting Director of the Determinations Review Program notified Plaintiff that her request for review was untimely. It further stated:

> [Y]our request is not accepted and the Letter of Determination issued to you by our field office has become the final determination of the Commission. The Commission's administrative processing of your charge has been terminated.
>
> Should you wish to pursue this matter further, you may do so by filing suit under Title VII in Federal District Court against the Respondent(s) named above. Any such suit must be filed within 90 days of the effective date of dismissal, as discussed in the Letter of Determination. Therefore, if a suit is not filed by January 12, 1990, your Right to Sue will be lost.

Defendant's Ex. 10 attached to its brief in support of its motion for summary judgment. Plaintiff testified she received the Review Program's rejection on January 12, 1990. Plaintiff's complaint in the present case was filed on January 17, 1990.

Defendant argues that Plaintiff's Title VII is barred by the statute of limitations for either of two reasons. First, it alleges that Plaintiff's charge of discrimination was filed outside the 300-day period for filing under 42 U.S.C. §2000e-5(e). The statute provides as a general rule that a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. *Id.* If a complainant initially institutes proceedings with a state or local agency

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[3]Plaintiff's counsel argues that Plaintiff "contends that she filed her request [for review of determination] on or before the 1st day, of October, 1989." Plaintiff's brief in support of the objection to motion for summary judgment at 4. However, the record is devoid of any evidence relative to this contention.

with authority to grant or seek relief from the practice charged, the time limit for filing with the EEOC is extended to 300 days. *Id.* The Act further provides that no charge may be filed with the EEOC until 60 days have elapsed from initial filing of the charge with an authorized state or local agency, unless that agency's proceedings "have been earlier terminated." 42 U.S.C. §2000e-5(c). Because of the 60-day referral period, a complainant must file a charge with the appropriate state agency, or have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory act in order to ensure that it may be filed with the EEOC within the 300-day limit. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). If the complainant does not file within 240 days, the charge may still be timely filed with the EEOC if the state agency terminates its proceedings before 300 days. *Id.* "Termination" of state proceedings has been held to include a waiver of a right to initially process a charge of discrimination. *See E.E.O.C. v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988).

In the present case, Oklahoma has a work-sharing agreement with the EEOC. Thus, provided Plaintiff is able to meet the 300-day requirement as outlined above, her charge of discrimination was timely filed.

The limitations period for filing a claim with the EEOC begins to run on the date the plaintiff receives notice of the allegedly discriminatory act, not the date the decision actually takes effect. *Tadros v. Coleman*, 717 F. Supp. 996 (S.D. N.Y. 1989) *affirmed*, 898 F.2d 10 (2nd Cir. 1990). If there is some question concerning when plaintiff received notice, the limitations period begins to run from the time the plaintiff knows or reasonably should know that the act occurred. *McWilliams v. Escambia County School Bd.*, 658 F.2d 326 (5th Cir. 1981).

Here, the evidence indicates that notice was sent to Plaintiff on June 24, 1985. However, in her deposi-

tion, Plaintiff denied ever having received such notification although it was sent to her correct address. *See* Defendant's Ex. 16 attached to its brief in support of motion for summary judgment. Plaintiff further admitted that, even though she did not recall seeing the June 24, 1985, letter, she was told on the phone that the position had been filled. But she does not remember when this conversation took place. *Id.* Since the evidence is such that a precise date for the telephone conversation cannot be fixed, the only evidence on this issue is the June 24, 1985, letter. Allowing three days for time in the mail, the date on which the 300-day period begins to run is June 27, 1985. Three hundred days from June 27, 1985 is April 24, 1986.

The evidence in this case shows that the Oklahoma Human Rights Commission deferred processing of Plaintiff's initial charge and notified EEOC of such on April 23, 1986, the 299th day. The court therefore finds that Plaintiff's charge was indeed filed within the statutory period.

Defendant next argues that Plaintiff filed her complaint in this court outside the EEOC-imposed January 12, 1990, filing date set forth in the EEOC determination letter; consequently, her Title VII is time-barred. The record indeed reflects that Plaintiff's complaint was filed on January 17, 1990. Plaintiff, in turn, argues that equitable tolling should apply to toll the period for filing for two reasons. First, she urges that the finality of the determination letter which was contingent upon her request for review from the Determinations Review Program was improper. Second, she argues that she was misled into thinking the determination was being reviewed until January 12, 1990, when she received notice from the Determinations Review Program that her review was rejected for having been filed untimely.

The United States Supreme Court has recognized that limitations period for actions brought under Title VII are not jurisdictional and may be subject to equitable tolling. *Zipes v. Transworld Airlines Inc.*, 455 U.S. 385 (1982). Equitable tolling is appropriate only where the circumstances of the case rise to a level of active deception, sufficient to invoke the powers of equity. For instance, equitable tolling may be appropriate under the following circumstances:

1. plaintiff has received inadequate notice;
2. a motion for appointment of counsel is pending;
3. the court has led the plaintiff to believe that she had done everything required of her;
4. affirmative misconduct on the part of a defendant lulled the plaintiff in inaction.

See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984).

Addressing Plaintiff's first argument, the court finds her position unpersuasive. Plaintiff offers no case law or other argument in support of her position. Absent an argument based either on law or public policy, the court is unwilling to conclude that the EEOC's actions in this case were improper.

Moreover, the court determines that the September 24, 1989, letter to Plaintiff very clearly stated her further responsibilities. She was required to either request review by letter delivered or postmarked by October 13, 1989, or file suit by January 12, 1990. Plaintiff did neither. Therefore, the court fails to see how Plaintiff could have been misled by the review program's actions. A review of the record reveals no circumstance or action on the part of EEOC or Defendant which could constitute a sufficient ground for equitable tolling. Accordingly, Plaintiff's Title VII claim should be dismissed. As there are no remaining claims, this action should be dismissed in its entirety.

WHEREFORE, IT IS ORDERED that Defendant, Rose State College's, motion for summary judgment is GRANTED, and this action is DISMISSED in its entirety. Accordingly, the trial date currently set for April 8, 1991 is hereby stricken.

Dated this 5th day of April, 1990.

UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 4-5-91

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-6180

W.M. SCHEERER,
Plaintiff-Appellant

v.

ROSE STATE COLLEGE; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; DONALD BURRIS; AND EVAN KEMP,
Defendants-Appellees.

[Filed Dec. 4, 1991]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 90-CV-101-B)

Submitted on the briefs:

W.M. Scheerer, pro se.

Sherry Blankenship and Ted N. Pool of Pool, Thompson, Coldiron Blankenship & Vincent, Oklahoma, City, Oklahoma, for Defendant-Appellee Rose State College.

Donald R. Livingston, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, and Lamont N. White, Attorney, Equal Employment Opportunity Commission, Washington, D.C., for Defendants-Appellees Equal Employment Opportunity Commission, Donald Burris, and Evan J. Kemp, Jr.

Before ANDERSON, BARRETT, and BRORBY, Circuit Judges.

BARRETT, Senior Circuit Judge.

Plaintiff appeals[1] from an adverse judgment of the district court, which in three separate orders granted a Motion to Dismiss filed by Defendant Equal Employment Opportunity Commission (EEOC), another such motion filed by Defendants Donald Burris and Evan Kemp (individual EEOC Defendants), and a Motion for Summary Judgment filed by Defendant Rose State College (RSC). Plaintiff brought this action under various civil rights statutes to redress an alleged discriminatory hiring practice by RSC and an alleged discriminatory failure by EEOC properly to investigate and pursue her claim against RSC.

Dismissal of EEOC

In its Motion to Dismiss, EEOC argued that Congress has not authorized, either expressly or impliedly, a cause of action directly against the EEOC for misprocessing of claims asserted against third-party employers. R. Vol. I, docs. 4 and 5. This motion was renewed when Plaintiff, then represented by counsel, amended her complaint. R. Vol. I, doc. 13. Plaintiff never responded to the motion. Consequently, the district court did not reach the merits of the motion, but rather granted it on the basis of W.D. Okla. R. 14(A), pursuant to which an unanswered motion may be deemed confessed. R. Vol. I, doc. 14 (Order granting EEOC'S Motion to Dismiss); *see also* R. Vol. I, doc. 19 (Order denying Plaintiff's Motion to Reconsider Dismissal of EEOC.)

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[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

In light of the circumstances surrounding the timing, service, and reassertion of EEOC's motion,[2] *see* R. Vol. I, doc. 16 (Plaintiff's Memorandum Brief in Support of Motion to Reconsider dismissal of EEOC), there is a serious question whether the district court's purely procedural disposition could be upheld in view of several recent opinions of this circuit reversing similar rulings in roughly comparable settings as unduly drastic. *See, e.g., Miller v. Department of Treasury*, 934 F.2d 1161, 1162 (10th Cir. 1991); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1396 (10th Cir. 1988); *Meade v. Grubbs*, 841 F.2d 1512, 1519-22 (10th Cir. 1988). We need not resolve the matter, however, as we conclude that dismissal of Plaintiff's claim is appropriate on the substantive legal basis asserted in EEOC's motion. *See generally Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir. 1988) (court of appeals is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court") (quoting *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987)).

"The circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim." *Peavy v. Polytechnic Inst.*, 749 F. Supp. 58, 58 (E.D.N.Y 1990), *aff'd*, 940 F.2d 648 (2d Cir. 1991); *see, e.g., McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984); *Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984); *Francis-Sobel v. University of Me.*, 597 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 444 U.S. 949 (1979); *Georator Corp. v. EEOC*,

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[2]EEOC had been neither named as a party in Plaintiff's initial, pro se pleading nor served with process when it filed its Motion to Dismiss and accompanying brief, which Plaintiff averred she never received. After Plaintiff retained counsel and filed her Amended Complaint adding EEOC as a named defendant, EEOC "reasserted" its Motion to Dismiss but never served the underlying materials on counsel or plaintiff.

592 F.2d 765, 767-69 (4th Cir. 1979); *Gibson v. Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979). Following this established line of authority, we hold that Plaintiff's claim for compensatory and punitive damages against EEOC under the cited statutory authority should have been dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as originally argued by EEOC below.

Dismissal of Individual EEOC Defendants

We need not decide here whether and under what circumstances EEOC employees, as opposed to the agency itself, may be subject to suit for damages for improper conduct in connection with the processing of a discrimination charge. The district court noted that Plaintiff's claim in this regard could be dismissed because "Plaintiff has failed to allege any direct or personal involvement on the part of Defendants Kemp and Burris." R. Vol. I, doc. 31 at 3 (Order granting individual EEOC Defendants' Motion to Dismiss). Indeed, although these Defendants are named as parties, not one factual allegation in Plaintiff's First Amended Complaint so much as mentions them. *See* R. Vol. I, doc. 11. All of the allegations regarding misprocessing of Plaintiff's discrimination charge simply attribute such conduct to the agency itself, without further elaboration. *Id.* at 6-8. It was proper for the district court to dismiss the individual EEOC Defendants, as no claim was even facially stated against them.[3]

Summary Judgment for RSC

Plaintiff relied on several legal bases for her action against RSC, all of which were rejected, for various reasons, by the district court. Plaintiff in-

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[3]We note that Plaintiff never moved to amend her pleadings to supply the particularized factual allegations the district court found lacking in its order dismissing these Defendants.

voked 20 U.S.C. §1681 (prohibiting sex discrimination in federally funded programs) and §1684 (prohibiting discrimination on account of blindness or visual impairment in federally funded programs) without any further elaboration in her Amended Complaint. In its Motion for Summary Judgment, RSC argued that Plaintiff could not establish a prima facie case of sex discrimination under §1681, which incorporates the same elements of proof required in Title VII cases, *see Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316-18 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987), because the position denied Plaintiff was filled by another woman.[4] *See Risher v. Aldridge*, 889 F.2d 592, 596 n.11 (5th Cir. 1989) (prima facie case for sex discrimination in hiring); *see also Breneman v. Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986) (discriminatory discharge); *Namenwirth v. Board of Regents*, 769 F.2d 1235, 1240 (7th Cir. 1985) (discriminatory denial of tenure), *cert. denied*, 474 U.S. 1061 (1986). RSC contended that §1684 "is not applicable to the instant case since the Plaintiff is neither blind nor suffering from severely impaired vision and makes no allegations of such." R. Vol. II at 13. The district court granted RSC's motion as to these sections because Plaintiff wholly failed to substantiate her position in response to the arguments outlined above. Plaintiff has likewise, on appeal, neglected to address directly either the district court's ruling or the merits of RSC's arguments. We affirm the district court on these matters.

The district court concluded that Plaintiff's reliance on 42 U.S.C. §1981 and §1982 to redress conduct that occurred some four and a half years prior to suit was precluded by the two-year statute of limitations applicable to personal injury suits in Oklahoma. *See*

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[4] We also note that Plaintiff's Amended Complaint is devoid of any factual allegation of sex discrimination.

Okla. Stat. tit. 12, §95 (Third). *See generally Meade v. Grubbs*, 841 F.2d at 1524. The Supreme Court has held that the forum state's statute of limitations for personal injury actions provides the appropriate limitations period for civil rights claims under §1981, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987), as well as 42 U.S.C. §1983, *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985), but the Court has not yet addressed the issue in connection with §1982. However, we agree with the district court that the same basic considerations underlying the holdings in *Goodman* and *Wilson* apply with respect to Plaintiff's §1982 claim and, therefore, that section 95 (Third) barred its assertion as well.[5] *See Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1528 (7th Cir. 1990) (authority for application of state personal injury statute of limitations to §1982 suit (a point parties stipulated to) could be derived by combining *Wilson* holding regarding §1983 with prior circuit precedent that §1982 and §1983 should be treated the same for limitations purposes); *Rodriguez v. Village of Island Park, Inc.*, No. CV-89-2676, 1991 U.S. Dist. LEXIS 9469, at *13-14 (E.D.N.Y. July 2, 1991) (post-*Wilson* and *Goodman* decision holding that §1982 is sufficiently analogous to §1981 and §1983 to warrant use of the same limitations period); *see*

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[5] Although Plaintiff's cause of action accrued prior to *Goodman*, we see no retroactivity problem in applying section 95 (Third) to Plaintiff's claims under §1981 and §1982. A year before the events involved here, this court presaged *Goodman* by applying section 95 (Third) to a §1981 claim in an action arising out of Oklahoma. *See EEOC v. Gaddis*, 733 F.2d 1373, 1377 (10th Cir. 1984). While we have no comparable §1982 decision, given our holdings in *Gaddis* and *Abbitt v. Franklin*, 731 F.2d 661, 662-63 (10th Cir. 1984) (applying section 95 (Third) to §1983 claim in accordance with *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261 (1985)), application of section 95 (Third) to Plaintiff's §1982 claim is simply a logical extension of precedent predating accrual of the cause of action asserted here. Under the circumstances, reliance on a statute of limitations other than section 95 would have been unfounded, and a limited, prospective application of our decision in this regard is not warranted. *See generally Budinich v. Becton Dickinson & Co.*, 807 F.2d 155, 157-58 (10th Cir. 1986), *aff'd*, 486 U.S. 196 (1988).

also Allen v. Gifford, 462 F.2d 615, 615 (4th Cir.) (pre-*Wilson* decision holding that §1982 should be governed by same statute of limitations applicable to §1983), *cert. denied*, 409 U.S. 876 (1972); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 488 (7th Cir.) (pre-*Goodman* decision holding that §1982 should be governed by same statute of limitations applicable to §1981), *cert. denied*, 400 U.S. 911 (1970); *cf. Callwood v. Questel*, 883 F.2d 272, 274 (3d Cir. 1989) (personal injury statute of limitations applied to §1985 claim in light of *Wilson* and *Goodman*).

Finally, the district court dismissed Plaintiff's Title VII claim of race discrimination as untimely filed under 42 U.S.C. §2000e-5(f)(1). The district court recognized that this nonjurisdictional limitations period is subject to equitable tolling, *see Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1983) (Supreme Court's holding regarding nonjurisdictional status of requirement that charge be timely filed with EEOC, *see Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393 (1982), is equally applicable to §2000e-5(f)(1) requirement that suit be timely filed in federal court), but concluded that the circumstances did not warrant such relief. *See* R. Vol. I, doc. 50 at 5-8, 10-12. We agree. "[I]n this circuit, a Title VII time limit will be tolled *only* if there has been 'active deception' " of the claimant regarding procedural prerequisites. *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989). The EEOC's September 29, 1989, "Determination" unequivocally advised Plaintiff that, absent a request for review made by October 13, 1989, the existing determination would become final and her right to sue would expire on January 12, 1990. *See* R. Vol. II, Exhibit 9. The EEOC repeated the same admonition in its January 5, 1990, rejection of Plaintiff's untimely request for review. *See* R. Vol. II, Exhibit 10. While Plaintiff evidently relied to her

detriment upon her belated, and therefore ineffective, request for review, this "was not due to a false representation by any court, agency, or putative defendant." *Johnson*, 861 F.2d at 1481. Moreover, the EEOC documents involved here exhibit none of the misleading ambiguity we deemed sufficient to warrant equitable tolling in *Martinez v. Orr*, 738 F.2d 1107, 1111-12 (10th Cir. 1984). On the contrary, the mandatory nature of both the January 12, 1990, deadline and the time limitation on the only exception thereto was made abundantly clear by EEOC.

For the reasons discussed above, we AFFIRM the judgment of the United States District Court for the Western District of Oklahoma in favor of all Defendants.

APPENDIX C

42 §2000e-5

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this

section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Appendix D

DEPOSITION OF DR. W.M. SCHEERER
OCTOBER 3, 1990

Dr. Scheerer, to make sure we're clear, the copies I have shown you of those last two documents, J and I, also have a received stamp by Rose State College on them.

When you have identified these as being copies, I think we understand that you mean your copy did not have the Rose State stamp on it; is that correct?

A. That's correct. I sent them a photocopy.

Q. Well, I didn't want there to be any confusion about that.

Dr. Scheerer, I'm showing you a document marked Defendant's Exhibit K. Would you please identify that?

A. This is a letter from EEOC, Determination.

Q. Did you receive a copy of this, Dr. Scheerer?

A. I don't remember receiving this. What is the date on this?

Q. September 29th, 1989.

A. Oh, yes, I do.

Q. You did receive a copy of this?

A. Uh-huh.

Q. Do you recall when you received it, Dr. Scheerer?

A. I received it shortly after that date, and I responded to the Washington office.

Q. You received it shortly after September 29th?

A. Right. I responded on this — I responded — I think this is the one. I responded on the bottom of the letter that I got from Washington.

Q. What letter to Washington? You mean, you responded on the bottom of your copy of this determination document?

A. I responded to this on a letter that he sent me. This wasn't the one.

Q. What letter was that, Dr. Scheerer?

A. It was a letter stating that he — how they had appointed someone or something. Burris sent the letter. And I — not Burris. The lady from Dallas sent me a letter.

Q. That letter that you're referring to, is that any of the letters that we've looked at today?

A. Do we have a letter? I saw a letter from that lady in Dallas.

Anyway, I wrote —

MS. BLANKENSHIP: Let's go off the record just a minute.

(Discussion off the record)

Q. (By Ms. Blankenship) Dr. Scheerer, do you have with you today a copy of the letter you responded to, a copy of the letter from the EEOC with your response written on it?

A. No, I don't have it with me. I thought I saw that here. I guess I didn't.

Q. You did not bring that with you today?

A. No, I didn't. But I can — I'll find it.

Q. Would you be willing to furnish that to me, please?

A. Sure.

Q. Do you recall whether you wrote that letter before or after you received this determination letter?

A. It was after the determination.

Q. Did you receive the letter from the EEOC before or after you received the determination letter?

So we're not confused, as I understand it, you received a letter from the EEOC –

A. In Washington.

Q. – in Washington. After that you received this determination document; is that correct?

A. I received a determination document I rejected. And I thought I saw that here.

MR. DAVIS: What are we on now?

MS. BLANKENSHIP: I'm trying to clarify this letter that she says that she sent but she said she did not bring it with her.

THE WITNESS: The one that I wrote on the bottom of. I wrote that on the bottom of a Burris letter, wasn't it? I think it was. On the bottom of a Burris letter, because he gave me so many days to respond.

MR. DAVIS: Dr. Scheerer, you must understand that Ms. Blankenship does not represent EEOC and she may not have Mr. Burris' file or copies of his letter.

She represents Rose State College. As such, she has quite an extensive file of EEOC, but not all of their file.

THE WITNESS: Oh, I see.

Q. (By Ms. Blankenship) Dr. Scheerer, would you be willing to furnish me a copy of the letter from the EEOC with your response?

A. Sure.

Q. But to the best of your recollection, you responded – or your letter back to the EEOC was after you had received the determination letter?

A. Uh-huh.

Q. Do you recall the substance of the letter?

A. See, he gave me – I was given –

Q. Wait just a minute, Dr. Scheerer. Let me show you another document here. This may clear up the confusion.

I'm showing you a document marked Defendant's Exhibit L. Would you identify that, please?

A. This is a letter from Jacqueline Bradley, from the Dallas office, EEOC.

MR. DAVIS: Now, this was before all of the other things.

THE WITNESS: Yes, this was before that.

Q. (By Ms. Blankenship) Is this the letter you're talking about that you wrote your response on?

A. No. There's another one.

MR. DAVIS: Burris sent her a letter actually about six days before the letter was dated from Washington.

In Burris' letter he did essentially the same thing as the National Director's letter did.

She responded upon – I'm using the word correctly – upon Burris' letter. Without directing a separate response to the Washington office, she simply made her response upon the letter that she had received from Burris.

MS. BLANKENSHIP: May I have a copy of that letter?

MR. DAVIS: I'm going to get you a copy of it. You know I am. I'm going to be talking about it. Okay?

Q. (By Ms. Blankenship) Do you recall the date of that letter, Dr. Scheerer?

A. It's a few days after his date. Because when I got it, I responded straight away and sent it to Washington.

Q. Are we talking about August or September?

A. September.

Q. But it was before you received this determination letter?

A. No, it was – You see, after I received this –

MR. DAVIS: Doctor, if you're not sure –

THE WITNESS: I'm not sure.

Q. (By Ms. Blankenship) I'm calling it the determination letter, because that's what it's marked.

A. I'm not sure, but I'll get a copy of that.

MR. DAVIS: Counsel, I frankly do have a copy of that letter. And I will send you a copy of it, along with this other material.

And if you will allow me to interject this, Director Burris' letter, who was the Regional Director, is dated the 18th of September.

The Director of EEOC out of Washington, his letter is dated the 24th. I haven't the slightest idea when they were received.

But I do know that she made her response on the bottom of and upon Director Burris' letter.

MS. BLANKENSHIP: Is it dated; do you recall?

MR. DAVIS: Her response?

MS. BLANKENSHIP: Uh-huh.

MR. DAVIS: No, it's not dated. It's on the bottom, it's at the end and upon that letter.

Q. (By Ms. Blankenship) Do you recall, then, Dr. Scheerer, regardless of the date that counsel is talk-

ing about, do you recall whether you wrote your response after you had received this determination letter or before?

A. I don't remember the sequence. We have to see the date on his letter. And I gave my response, not to him, but to Washington on his letter.

Q. "His" being Mr. Burris?

A. Uh-huh.

Q. And Mr. Burris is from where? Washington or —

A. Here.

Q. Do you recall receiving that letter before you received the determination letter?

A. I don't remember that. You see, during this time, I was — I had protested them setting it aside, because they said — they were saying what Rose State had said. Rose State told Burris that it wasn't in his jurisdiction, and that's why he sent this and —

See, all of this was in response to my continued inquiry as to why.

Q. Do you recall what you said in that letter to Mr. Burris, the one you hand-wrote?

A. I didn't hand-write it. It's typed.

Q. You typed it at the bottom?

at the other day, and I will show you the copy again, this is the letter dated December [sic] 24th. And on the second page, in the second paragraph, would you look at the address there, please.

A. I don't have this. I have told you before, I don't have this, this determination letter. I never did get this.

Q. Are you now saying you have never seen this determination letter?

A. Not until in here. If you will recall, when I was explaining about my response — and I explained about my response on the bottom of the letter. That's why I knew this wasn't the letter.

I didn't never get this.

MS. BLANKENSHIP: Let's break for just a minute.

(Short break)

Q. (By Ms. Blankenship) Dr. Scheerer, we are still talking about what was marked previously as Defendants' Exhibit K, titled, for purposes of talking about it, A Determination Letter. Do you have that in front of you?

A. I have it in front of me.

Q. Dr. Scheerer, it is your testimony today that you never saw that letter until the deposition last week?

A. Right.

Q. Dr. Scheerer, do you recall telling me last week that you did recall seeing this letter?

A. Yes. I told you I didn't have that. And if you will find in your note —

MR. DAVIS: Just answer the question. If you have answered it, let's move on. She has a right to ask you questions.

THE WITNESS: I was just going to –

MR. DAVIS: That's all right. Just answer the question.

Q. (By Ms. Blankenship) Dr. Scheerer, I don't want there to be any misunderstanding. Is it your testimony today that you never saw that determination letter, marked Exhibit K, until last week at this deposition?

A. That's right, when you mentioned about it. I was trying to explain about, that I had wrote on the bottom of the letter. And in looking at this, I couldn't have, because it was not enough space, remember? And then you –

MR. DAVIS: Talk for the record, Dr. Scheerer. Go ahead.

THE WITNESS: Well, I explained that I had responded on the bottom of his letter, which was the 18th.

Q. (By Ms. Blankenship) Dr. Scheerer, I would like to show you – I am going to put this back in here so it doesn't get lost – one of the other documents you showed me, or your counsel sent me, titled, "Rejection of Untimely Request for Review, Title VII." Do you have that in front of you, please?

A. Yes.

Q. That's marked Defendants' Exhibit V; right?

A. If that's a V.

Q. That is a V.

Would you identify that for us, please?

A. It's a letter from EEOC, dated January 5th, out of Washington, D.C.

Q. Dr. Scheerer, would you read the first line of that document, please.

A. "Rejection of Untimely Request for Review."

Q. The first line of the next paragraph.

A. "The commission has received your request for review . . ."

Q. Would you please tell me what request for review they are talking about?

A. I don't know what they're talking about. I asked for a request here. (Indicating)

(3)

Supreme Court, U.S.
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No. 91-1735

In the Supreme Court of the United States

OCTOBER TERM, 1991

W. M. SCHEERER, PETITIONER

v.

ROSE STATE COLLEGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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9

QUESTION PRESENTED

Whether a Title VII claimant has a cause of action against the Equal Employment Opportunity Commission based on its allegedly improper processing of an employment discrimination charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 950 F.2d 661. The order of the district court (Pet. App. B) granting summary judgment in favor of respondent Rose State College is reported at 774 F. Supp. 620. The orders of the district court dismissing the action as to respondent Equal Employment Opportunity Commission (Pet. App. C18-C19) and as to respondents Donald Burris and Evan Kemp are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1991. The petition for a writ of certiorari was filed on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 26, 1986, petitioner filed a charge with the Oklahoma City Area Office of the Equal Employment Opportunity Commission (EEOC), alleging that Rose State College had failed to hire her for the position of Director/Instructor of the Nurse Sciences Program because of her race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*. Although petitioner's charge was initially dismissed as untimely, the charge was reopened by the EEOC's Dallas District Office in August 1989. Pet. App. B7-B8; Gov't C.A Br. 3.

On September 18, 1989, Donald Burris, the director of EEOC's Oklahoma City Area Office, advised petitioner that, based on his review of the file, he did not believe that Rose State College had discriminated against her because of her race. Burris also advised petitioner that she could submit additional information to support her charge within ten days. Petitioner did not submit any additional information. Pet. App. B8; Pet. C.A. Br. App. 15a.

On September 24, 1989, Burris sent petitioner a letter of determination stating that there was no reasonable cause to believe that she had been discriminated against because of her race. Pet. App. B9. The letter advised petitioner that she could request review of that determination by the EEOC's Determinations Review Program (DRP) in Washington, D.C. The letter stated that any request for review by DRP had to be postmarked no later than October 13, 1989. *Ibid.* The letter further stated that, if petitioner did not submit a timely request for review by DRP, the determination set forth in the letter would become final, and petitioner would have to file a civil action no later than January 12, 1990, to preserve her Title VII rights. *Id.* at B10.

On October 27, 1989, DRP received a copy of Burris's letter of September 18, 1989, with an undated response by

petitioner typed at the bottom. Pet. App. B10. By letter dated January 5, 1990, DRP advised petitioner that her request for review was untimely and that she had to file a civil action by January 12, 1990, to preserve her Title VII rights. *Id.* at B11.

2. Petitioner, proceeding pro se, filed the present action on January 17, 1990, naming Rose State College and Donald Burris as defendants. The complaint alleged that the College had refused to employ her because of her race, and that EEOC had improperly processed her discrimination charge. Pet. App. A2. The EEOC filed a motion to dismiss the complaint on March 19, 1990. *Id.* at C18-C19. On April 25, 1990, petitioner, now represented by counsel, filed an amended complaint adding EEOC and its Chairman, Evan J. Kemp, as defendants. *Id.* at C19; Gov't C.A. Br. 2. On May 11, 1990, EEOC filed a response to the amended complaint which incorporated by reference the agency's earlier motion to dismiss. Pet. App. A3 n.2.

On June 15, 1990, the district court issued an order granting EEOC's motion to dismiss based on petitioner's failure to respond to the motion. Pet. App. C18-C19. On November 6, 1990, the district court dismissed the claims against Kemp and Burris. See *id.* at A2. Finally, on April 5, 1991, the court granted summary judgment in favor of Rose State College. *Id.* at B1-B18.

3. The court of appeals affirmed the district court's orders dismissing petitioner's claims against EEOC and the individual EEOC defendants and granting summary judgment in favor of Rose State College. Pet. App. A1-A12. The court of appeals initially expressed doubt whether petitioner's claims against EEOC and its officials were properly dismissed based solely on petitioner's failure to respond to EEOC's motion to dismiss those claims. *Id.* at A3. The court found it unnecessary to decide that issue, however, because it determined that

dismissal of the claims was proper in light of "the substantive legal basis asserted in EEOC's motion." *Id.* at A4. With respect to petitioner's claims against the agency, the court observed that "[t]he circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim." *Ibid.* (internal quotation marks omitted) (citations omitted). The court adopted that "established line of authority," holding that petitioner had failed to state a cause of action against EEOC. *Id.* at A4-A5. The court also held that petitioner had failed to state a cause of action against the individual EEOC defendants because she had not alleged "direct personal involvement on the part of [those defendants]." *Id.* at A5.[1]

ARGUMENT

Petitioner renews her contention (Pet. 5-8, 13, 19-24) that EEOC improperly processed her Title VII charge.[2] As the court of appeals correctly held, however, that contention does not state a cause of action upon which relief can be granted. Pet. App. A4-A5. Further review is therefore not warranted.

Every other court to consider the issue has likewise held that no cause of action will lie against EEOC based

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[1] With respect to petitioner's claims against Rose State College, the court of appeals affirmed the district court's rulings that petitioner "wholly failed to substantiate" her claims under 20 U.S.C. 1681 and 1682 (relating to discrimination in federally funded programs), and that petitioner's claims under 42 U.S.C. 1981 and 1982 and Title VII were time-barred. Pet. App. A6-A12.

[2] Petitioner does not challenge the court of appeals' holding (Pet. App. A5-A6) that her claims against the individual EEOC defendants were properly dismissed. In any event, here as in the courts below, petitioner's allegations of improper processing "attribute such conduct to the agency itself, without elaboration." *Id.* at A5.

on its allegedly improper processing of a Title VII charge. *McCottrell* v. *EEOC*, 726 F.2d 350, 351-352 (7th Cir. 1984); *Ward* v. *EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984); *Stewart* v. *EEOC*, 611 F.2d 679, 681-682 (7th Cir. 1979); *Francis-Sobel* v. *University of Maine*, 597 F.2d 15, 18 (1st Cir.), cert. denied, 444 U.S. 949 (1979); *Georator Corp.* v. *EEOC*, 592 F.2d 765, 768 (4th Cir. 1979); *Archie* v. *Chicago Truck Drivers*, 585 F.2d 210, 221-222 (7th Cir. 1978); *Gibson* v. *Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *Peavey* v. *Polytechnic Inst.*, 749 F. Supp. 58, 58-59 (E.D.N.Y. 1990), aff'd mem., 940 F.2d 648 (2d Cir. 1991) (Table); *Young* v. *Sullivan*, 733 F. Supp. 131 (D.D.C. 1990), aff'd mem., 946 F.2d 1568 (D.C. Cir. 1991) (Table), cert. denied, 112 S. Ct. 1291 (1992); *Hall* v. *EEOC*, 456 F. Supp. 695 (N.D. Cal. 1978).

These courts have recognized that "[t]he only 'right' [Title VII] establishes is the right to be free of discrimination." *Hall*, 456 F. Supp. at 700. When a Title VII plaintiff believes that EEOC has failed to vindicate that right, the remedy is to bring a civil action directly against the employer. "Implying a cause of action against the EEOC [would contradict] this policy of individual enforcement * * * and could dissipate the limited resources of the Commission in fruitless litigation with charging parties." *Ward*, 719 F.2d at 313. Thus, petitioner's claim of improper processing by EEOC was properly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

W. M. SCHEERER, PETITIONER

VS

ROSE STATE COLLEGE, AND THE
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF

The petitioner, W. M.Scheerer respectfully tenders this reply brief to the briefs filed by the defendants.

Counsel for Rose State fails to:1) acknowledge that petitioner rec'd notification that position had been filled was from a concerned employee, later confirmed by personnel officer who stated that the courts were available; 2) Previous director re-signed without notice over the Christmas holidays,

without conciliation; 3) the determination letter petitioner referenced in deposition was the notice from the local EEOC informing her that EEOC did not have jurisdiction because complaint was untimely filed, a June notification as documented. The determination letter Rose State referenced was never received by petitioner. The tardy and flawed deposition submitted by Rose State at this level indicated that the D. C. EEOC had responded prior to Jan. 12, 1989 and the local letter from EEOC gave specific instructions as to filing for a review. This letter was never received. The only letter rec'd after Sept. 19th was the letter of Jan. 12, 1990.

EEOC contended that the request for a review was tardy. Postal receipt submitted as Exhibit 4 upon appeal (since no exhibits nor a day in court were allowed petitioner) confirms request for review was received on July 18, 1989. There was no tardy request for a review; request

for a review was through conspiracy and fraud, ignored.

Burris and EEOC were both listed on the original complaint, counsel later added the name Kemp and EEOC; Jan. 4, 1991 petitioner requested the addition of harassment and intimidation by attorney, body language and verbal (6.5 hrs.) Exhibit 28. Racketeering was also to be added because of funding under Title V1 and 1X. Sexual and handicap discrimination were not complaints made by petitioner; petitioner was unaware of these complaints until appeal.

Petitioner has been denied a hearing at all levels, although it is a right; Every complaint was documented including the intended thief of residence by counlors.

The defendants' plea to deny the writ of centiorari is a plea to renounce the Constitution and justice. It is a demand to

confirm that regardless of an African American's qualifications and achievements, a white person who is not qualified as specified by the employing agency, the unqualified white as in this case must receive preference. It is a plea that economic tyranny is acceptable. Respondents' reply exceeded 30 days.

Petitioner respectfully pleads that this Honorable Court grant the petition and remand this action to the court of appeals. Rulings in support of Petition:

Poller v. Columbia Broadcasting System Inc., (1962) 368 US 464,L Ed. 2d 458,82 S Ct 486, 5 FR Serv 2d 886 and Sprague V. Vogt (1945,CA 8 Minn) 150 F2d 795, later app. (CA8Minn) 164 F 2d 312.

Respectfully submitted,

W. M. Scheerer, Pro se
June 24, 1992